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Disciplinary Regulation of Prosecutors as a Remedy for Abuses of Prosecutorial Discretion: A Descriptive and Normative Analysis

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I. INTRODUCTION

Although courts have traditionally relied primarily on prosecutors' individual self-restraint and institutional self-regulation to curb prosecutors' excesses and redress their wrongdoing,[1] aspects of prosecutors' conduct can be regulated externally as well. One potential source of external regulation is professional discipline. As lawyers, prosecutors are regulated by state courts, which oversee processes for disciplining lawyers who engage in misconduct.[2] In responding to prosecutors' wrongdoing, courts generally express a preference for professional discipline over civil liability, which is limited by principles of absolute and qualified immunity.[3] Likewise, courts favor professional discipline over adjudicatory remedies such as reversal of criminal convictions or suppression of evidence, which are often unavailable because of the harmless error doctrine and other limitations.[4]

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1 *See, e.g.*, United States v. Kojayan, 8 F.3d 1315, 1324 (9th Cir. 1993) (citations omitted) ("Much of what the United States Attorney's office does isn't open to public scrutiny or judicial review. It is therefore particularly important that the government discharge its responsibilities fairly, consistent with due process. The overwhelming majority of prosecutors are decent, ethical, honorable lawyers who understand the awesome power they wield, and the responsibility that goes with it."). *See generally* Robert H. Jackson, *The Federal Prosecutor*, 31 J. CRIM. L. & CRIMINOLOGY 3 (1940).

2 *See, e.g.*, Bruce Green & Jane Campbell Moriarty, *Rehabilitating Lawyers: Perceptions of Deviance and Its Cures in the Lawyer Reinstatement Process*, 40 FORDHAM URB. L.J. 139 (2012); Leslie C. Levin, *The Emperor's Clothes and Other Tales About the Standards for Imposing Lawyer Discipline Sanctions*, 48 AM. U. L. REV. 1 (1998).

3 *See, e.g.*, Connick v. Thompson, 563 U.S. 51 (2011) (rejecting municipal liability for *Brady* violations); Buckley v. Fitzsimmons, 509 U.S. 259 (1993) (holding prosecutors performing investigative functions are entitled to qualified immunity); Imbler v. Pachtman, 424 U.S. 409, 429 (1976) (rejecting civil rights claim against prosecutor and explaining that "a prosecutor stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an association of his peers").

4 *See, e.g.*, Bank of Nova Scotia v. United States, 487 U.S. 250, 263 (1988) (rejecting dismissal of indictment due to prosecutorial misconduct in a grand jury proceeding in case of harmless error, finding that "the court may direct a prosecutor to show cause why he should not be

For many years, however, the conventional wisdom has been that disciplinary authorities do not effectively regulate prosecutors.[5] Studies have concluded that prosecutors are rarely disciplined, even when a judge presiding over a criminal case finds that the prosecutor acted improperly.[6] Further, many observers have asserted that in the rare cases of discipline, courts typically let prosecutors off too lightly.[7] Disciplinary authorities' deferential treatment of prosecutors, though perhaps subject to explanation,[8] remains, in the view of many commentators, also

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disciplined and request the bar or the Department of Justice to initiate disciplinary proceedings against him"); *see also* United States v. Hasting, 461 U.S. 499, 506 n.5 (1983) (citation omitted) (rejecting reversal of conviction in case of harmless error, suggesting instead that "the court could have dealt with the offending argument by directing the District Court to order the prosecutor to show cause why he should not be disciplined, or by asking the Department of Justice to initiate a disciplinary proceeding against him"); United States v. McRae, 795 F.3d 471 (5th Cir. 2015); *In re* Larsen, No. 20140535, 2016 WL 3369545, at *6 (Utah June 16, 2016) (upholding discipline regardless of the absence of a *Brady* violation) ("The question under *Brady* is a matter of due process . . . . But rule 3.8(d)'s focus is different. It is aimed not only at assuring a fair trial—by articulating a standard for a motion for a new one—but also at establishing an ethical duty that will avoid the problem in the first place."). *But see, e.g.*, United States v. Bowen, 799 F.3d 336, 355 (5th Cir. 2015) (affirming reversal due to "[t]he district court's steady drip of discoveries of misconduct infecting every stage of this prosecution, combined with the government's continued obfuscation and deceit"); United States v. Lopez-Avila, 678 F.3d 955, 965–66 (9th Cir. 2012) (remanding for district court to consider dismissing the indictment with prejudice as a sanction for prosecutorial misconduct); People v. Velasco-Palacios, 235 Cal. App. 4th 439 (2015) (affirming dismissal of indictment as sanction for prosecutor's fabrication of evidence during plea negotiations).

[5] *See, e.g.*, Alex Kozinski, Preface, Criminal Law 2.0, 44 GEO. L.J. ANN. REV. CRIM. PROC. iii, xl (2015) (describing "futility of getting bar disciplinary boards to impose professional discipline for misconduct committed in the course of criminal prosecutions").

[6] *See, e.g.*, Matt Ferner, *Prosecutors Are Almost Never Disciplined for Misconduct*, HUFFINGTON POST (Feb. 11, 2016), http://www.huffingtonpost.com/entry/prosecutor-misconduct-justice_us_56bce00fe4b0c3c55050748a; Kozinski, *supra* note 5, at xl (asserting that "[t]here have been a few instances of professional discipline against prosecutors, though . . . much less than against similarly-situated private lawyers" and that "professional organizations are exceedingly reluctant to impose sanctions on prosecutors for misconduct in carrying out their professional responsibilities"); *see also* Charles E. MacLean & Stephen Wilks, *Keeping Arrows in the Quiver: Mapping the Contours of Prosecutorial Discretion*, 52 WASHBURN L.J. 59, 81 (2012) (citing "the small number of sanctions against prosecutors, relative to lawyers as a whole"); Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721, 725 (2001) (describing the "rarity of discipline" of prosecutors).

[7] *See, e.g.*, State *ex rel.* Oklahoma Bar Ass'n v. Miller, 309 P.3d 108, 120 (Okla. 2013) (finding "[i]nstances of prosecutorial misconduct from previous decades . . . were often met with nothing more than a reprimand or a short suspension"); *id.* at n.40 (citing sources); *cf.* MacLean & Wilks, *supra* note 6, at 62 (finding that in "extreme cases of unethical prosecutorial behavior . . . states' attorney discipline systems act swiftly and harshly," but that "[o]n the lower end of unethical prosecutorial behavior, the penalties appear to be somewhat rare and usually minimal when the line between unethical behavior and mere prosecutorial error is blurred").

[8] *See, e.g.*, Zacharias, *supra* note 6, at 725 (finding that "[m]any of the rules of professional conduct . . . are . . . altogether inapplicable, or barely applicable, to full-time prosecutors" and "[t]his, combined with the special characteristics of prosecutors and the activities they engage in, helps explain the rarity of discipline").

subject to criticism, if not altogether unjustifiable. Accordingly, critics urge disciplinary agencies to pursue prosecutors more aggressively, especially for forms of recurring wrongdoing such as improper closing arguments or withholding of exculpatory evidence.[9]

A handful of recent high-profile disciplinary cases, beginning with Mike Nifong's disbarment in 2007, give the impression that disciplinary agencies are getting more serious about responding to prosecutorial misconduct, and the public continues to pressure them to do so. But many legal scholars assume that even if professional discipline grows more robust with regard to certain areas of prosecutorial conduct, professional discipline can never be effective with regard to one broad, significant, and notably problematic area of prosecutorial conduct: the abusive exercise of prosecutorial discretion, especially with regard to charging and plea bargaining.[10] U.S. Supreme Court decisions and other case law establish that federal judges presiding over criminal cases are generally required, for reasons relating to constitutional separation of powers, to defer to prosecutors' decisions about whether to initiate or dismiss criminal charges.[11] Commentators suggest that similar concerns prevent state courts from implementing meaningful regulation of prosecutors' discretionary decisions through the disciplinary process.[12]

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[9] *See, e.g.*, Angela J. Davis, *The Legal Profession's Failure to Discipline Unethical Prosecutors*, 36 HOFSTRA L. REV. 275 (2007); Ellen Yaroshefsky, *Wrongful Convictions: It is Time to Take Prosecution Discipline Seriously*, 8 UDC L. REV. 275 (2004).

[10] *See, e.g.*, ANGELA DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR, 143–61 (2007); Kenneth J. Melilli, *Prosecutorial Discretion in an Adversary System*, 1992 BYU L. REV. 669, 678–82 (1992); James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1525 (1981) ("[T]here are good reasons to see prosecutors' virtually unlimited control over charging as inconsistent with a system of criminal procedure fair to defendants and to the public.").

[11] *See infra* notes 146–50 and accompanying text.

[12] *See, e.g.*, Rachel E. Barkow, *Organizational Guidelines for the Prosecutor's Office*, 31 CARDOZO L. REV. 2089 (2010):

> [E]ven if they possess the necessary staffing and funds to engage in a proper inquiry into misconduct, state bars, which are typically arms of the judiciary, may be reluctant to dig too deeply into the operation of the prosecutor's office out of concern that they will interfere with the workings of another part of government.

Id. at 2096; Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 977–78 (2009) ("Separation-of-powers concerns can also make bar authorities hesitate to intrude upon prosecutors' province."); Zacharias, *supra* note 6:

> [A]uthorities may sense a real separation of powers issue. Ultimately, bar authorities in most jurisdictions operate under the rubric of the courts. Prosecutors are members of the executive branch. To the extent discipline requires an investigation of the workings of a prosecutor's office, disciplinary agencies may consider it invasive of the authority of a coordinate branch of government. On occasion, prosecutors have directly raised the claim that the application of particular professional rules to them violates the principle of separation of powers.

Id. at 761.

Responding to these concerns, this Article explores the role of professional discipline in regulating prosecutors' work, focusing on disciplinary regulation of prosecutors' charging decisions, which are typically thought to be discretionary and therefore off-limits to judicial review. The subject is important. Prosecutors' discretionary decisions regarding whether to commence and continue a prosecution often determine the outcome of a criminal case.[13] For many years, courts, scholars, bar associations, law reform organizations, and others have expressed concern about prosecutors' abuse of this extraordinary power, documenting practices that appear to reflect political favoritism,[14] personal self-interest,[15] undercharging,[16] overcharging,[17] arbitrariness,[18] or bias,[19] among other possible deficiencies.[20]

Significantly, there is no consensus regarding how best to regulate prosecutors' exercise of discretion. Although some have favored legislative

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[13] *See, e.g.*, Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 408 (2001) ("The charging decision is arguably the most important prosecutorial power and the strongest example of the influence and reach of prosecutorial discretion."); Eisha Jain, *Prosecuting Collateral Consequences*, 104 GEO. L.J. 1197 (2016).

[14] *See, e.g.*, Anthony S. Barkow & Beth George, *Prosecuting Political Defendants*, 44 GA. L. REV. 953 (2010); Bruce A. Green & Fred C. Zacharias, *Prosecutorial Neutrality*, 2004 WIS. L. REV. 837, 847–48; Note, *Prosecutor's Discretion*, 103 U. PA. L. REV. 1057 (1955).

[15] *See, e.g.*, Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2464, 2470–73 (2004) (describing ways prosecutors' "pressures and incentives" affect plea bargain decisions); Mary De Ming Fan, *Disciplining Criminal Justice: The Peril Amid the Promise of Numbers*, 26 YALE L. & POL'Y REV. 1, 56 (2007) ("Scholars roundly critique prosecutors for pursuing self-interest and favorable statistics at the expense of the public interest.").

[16] *See, e.g.*, Tom Lininger, *An Ethical Duty to Charge Batterers Appropriately*, 22 DUKE J. GENDER L. & POL'Y 173 (2015) (analyzing undercharging in domestic violence cases); Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29 (2002); David Yellen, *Just Deserts and Lenient Prosecutors: The Flawed Case for Real-Offense Sentencing*, 91 NW. U. L. REV. 1434, 1435 (1997).

[17] *See, e.g.*, Kyle Graham, *Overcharging*, 11 OHIO ST. J. CRIM. L. 701 (2014); Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 FORDHAM L. REV. 851 (1995); Mitchell Stephens, *Ignoring Justice: Prosecutorial Discretion and the Ethics of Charging*, 35 N. KY. L. REV. 53 (2008).

[18] *See generally*, DAVIS, *supra* note 10.

[19] *See, e.g.*, Shelby A. Dickerson Moore, *Questioning the Autonomy of Prosecutorial Charging Decisions: Recognizing the Need to Exercise Discretion—Knowing There Will Be Consequences for Crossing the Line*, 60 LA. L. REV. 371 (2000); Ellen S. Podgor, *Race-ing Prosecutors' Ethics Codes*, 44 HARV. C.R.-C.L. L. REV. 461, 463 (2009); Anne Bowen Poulin, *Prosecutorial Discretion and Selective Prosecution: Enforcing Protection After* United States v. Armstrong, 34 AM. CRIM. L. REV. 1071, 1081–82, 1085 (1997).

[20] *See, e.g.*, Bibas, *supra* note 12, at 973 (referencing "systemic concerns about equality, arbitrariness, leniency, and overcharging"). *See also Prosecutorial Oversight: A National Dialogue in the Wake of* Connick v. Thompson, INNOCENCE PROJECT (Mar. 29, 2016), http://www.innocenceproject.org/prosecutorial-oversight-national-dialogue-wake-connick-v-thompson/; Jason Kreag, *Prosecutorial Analytics*, WASH. U. L. REV. (forthcoming 2017), http://ssrn.com/abstract=2764399.

oversight,[21] others view legislation as a "pipe dream," particularly given the political pressure on legislators to appear tough on crime.[22] Some urge more effective internal self-regulation,[23] but one might be skeptical of whether prosecutors can be persuaded to effectively rein in their own power.[24] Still others urge that the courts or legislation should authorize expanded judicial review of prosecutors' charging and plea-bargaining decisions,[25] but others view these alternatives as unrealistic, particularly in light of federal concerns over separation of powers.[26]

Against this background, the possibility that judicial oversight through professional discipline may play a meaningful future role in regulating prosecutors' discretionary decision making—notwithstanding the past ineffectiveness of discipline in regulating almost *any* aspect of prosecutors' work—deserves consideration. To be sure, expanded exercise of disciplinary authority leaves a number of issues unresolved, as discipline is traditionally limited to addressing misconduct, rather than responding to less substantial errors in judgment. Moreover, on a broader level, any attempt to determine the optimal strategy to rein in prosecutorial abuse of discretion would involve a range of additional factors, including an examination of various ways discretion is used.[27] Nevertheless, given the current under-regulation of prosecutorial decision making,

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[21] *See, e.g.*, Vorenberg, *supra* note 10, at 1566–68. *See also* DAVIS, *supra* note 10, at 180–89; Davis, *supra* note 13, at 462–63; Poulin, *supra* note 19, at 1119–22.

[22] Bibas, *supra* note 12, at 966. *See also* Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 911 (2009) ("The political process overwhelmingly favors prosecutors. Any oversight by Congress would serve largely to make sure that prosecutors are being sufficiently tough. . . . [I]t is hard to imagine a scenario where Congress would put in place an oversight scheme that would offer greater protection for defendants.").

[23] *See, e.g.*, Barkow, *supra* note 22; Bibas, *supra* note 12; Poulin, *supra* note 19, at 1122–24.

[24] *See, e.g.*, Barkow, *supra* note 22, at 917 (acknowledging difficulty in trying to "prompt prosecutors to change the view they have of themselves").

[25] *See, e.g.*, Donald G. Gifford, *Meaningful Reform of Plea Bargaining: The Control of Prosecutorial Discretion*, 1983 U. ILL. L. REV. 37 (1983).

[26] At least on the federal level, the question of whether courts could review charging decisions more strictly, either pursuant to legislative authorization or as a matter of inherent judicial authority, raises complicated questions of constitutional separation of powers. *Cf.* Morrison v. Olson, 487 U.S. 654 (1988) (upholding statutory provisions of independent counsel law against arguments of judicial encroachment on prosecutor's executive function); Heckler v. Chaney, 470 U.S. 821 (1985) (upholding presumption that agency decisions not to institute proceedings are not subject to judicial review). *See generally* William F. Pizzi, *Understanding Prosecutorial Discretion in the United States: The Limits of Comparative Criminal Procedure as an Instrument of Reform*, 54 OHIO ST. L.J. 1325 (1993). This article does not delve into these complex questions, though it emphasizes that, regardless of the federal view on separation-of-powers, state courts interpreting state constitutions can conceivably resolve these issues differently. *See infra* Part IV.

[27] *See, e.g.*, Donald A. Dripps, *Overcriminalization, Discretion, Waiver: A Survey of Possible Exit Strategies*, 109 PA. ST. L. REV. 1155 (2005).

this article seeks to demonstrate the potential value of increased disciplinary authority. In addition, discipline might serve a useful, interstitial function, as perhaps future laws will otherwise provide more meaningful restraints on prosecutors' power.

Part II of this Article discusses areas of misconduct for which prosecutors may be disciplined. It argues that, although few ethics rules specifically target prosecutors' work, a number of generally applicable rules potentially address much of what courts regard as prosecutorial misconduct. In particular, courts have a degree of latitude to interpret the current rules to regulate abuses of prosecutorial discretion.

Part III offers a largely descriptive analysis of how ethics rules have been enforced to date in cases involving prosecutors' professional work. It argues that although ethics rules may remain largely under-enforced as applied to prosecutors, the *Nifong* case may mark a potential turning point, as some disciplinary authorities now appear to be responding more forcefully to prosecutorial misconduct. Moreover, several disciplinary cases have been brought against high-ranking elected prosecutors, driven substantially by concerns about abuses of charging power.

Finally, Part IV considers the potential future role of professional discipline in responding to prosecutors' abuse of charging discretion. It focuses on commentators' assumption that discipline is an unpromising route to redressing abuses of discretion because state courts in the disciplinary context, like federal courts in the adjudicatory context, must generally defer to prosecutors' discretionary decision making. We argue that federal separations of powers principles, which account for federal courts' deference in adjudicating cases, are not universally applicable to state courts. Indeed, state courts often exercise the authority to inquire into various aspects of prosecutors' decision making, in both adjudicating criminal cases and sanctioning prosecutors who violate the constitution, statutes, or ethics rules.

The harder question is whether courts can regulate prosecutors' discretionary decision making in a manner similar to the regulation of prosecutors' work as trial lawyers. That is, may state courts, through rule making or interpretation, adopt independent ethical standards to govern prosecutors' exercise of charging discretion and sanction prosecutors for abuses of discretion that contravene the applicable rules? We show that at least some state courts exercise this authority as well, and in so doing, the courts appear to rely on firm doctrinal and policy grounds. The Article does not explore whether an expansive interpretation of state courts' disciplinary authority is ultimately justified under the various state constitutions. However, the Article concludes that, to the extent courts exercise an increasingly robust form of professional discipline of prosecutors, one can expect to see more cases targeting not only discrete law-breaking but also more general prosecutorial abuses of power, including in areas often thought to be within the broad discretion of prosecutorial decision making.

II. ETHICS RULES REGULATING PROSECUTORS' WORK

State courts adopt codes of ethics, consisting of rules of professional conduct that regulate the work of lawyers licensed to practice law in the state or appearing in the state's courts pro hac vice.[28] States' ethics rules are based largely, in substance and typically in form, on the ABA Model Rules of Professional Conduct.[29] Lawyers, including prosecutors, are subject to professional discipline, such as a private or public reprimand, suspension, or disbarment, for violating ethics rules.[30] In most states, discipline is a quasi-criminal process overseen by the state judiciary. In many states, staff lawyers or volunteer lawyers investigate, initiate and prosecute disciplinary cases, which are heard by lawyers or judges, subject to judicial review.[31] A court presiding over a criminal case might conclude that particular prosecutorial conduct is wrongful, and in some instances, a prosecutor might be held up to judicial or public opprobrium for improper conduct, but the prosecutor cannot be professionally disciplined unless the conduct violates an ethics rule. Consequently, the potential effectiveness of discipline as a regulatory mechanism depends in the first instance on the reach of the ethics rules.

Although courts and commentators sometimes proclaim that prosecutors have different and higher ethical obligations than other lawyers,[32] this principle is largely absent from the ethics rules.[33] In general, prosecutors are subject, at most,

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[28] *See generally* Fred C. Zacharias & Bruce A. Green, *Rationalizing Judicial Regulation of Lawyers*, 70 OHIO ST. L.J. 73 (2009).

[29] MODEL RULES OF PROF'L CONDUCT (AM. BAR ASS'N 2013) [hereinafter MODEL RULES].

[30] *See supra* note 2.

[31] *See, e.g.*, State *ex rel.* Oklahoma Bar Ass'n v. Miller, 309 P.3d 108, 113–14 (Okla. 2013) (explaining that Oklahoma court makes factual determinations and determines the sanction with assistance from representatives of the private bar who hear evidence and make recommendations).

[32] For the classic judicial articulation of this principle, see *Berger v. United States*, 295 U.S. 78, 88 (1935) ("The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done."). *See also, e.g.*, United States v. Kojayan, 8 F.3d 1315 at 1323 (9th Cir. 1993) (citation omitted) ("Prosecutors are subject to constraints and responsibilities that don't apply to other lawyers. While lawyers representing private parties may—indeed, must—do everything ethically permissible to advance their clients' interests, lawyers representing the government in criminal cases serve truth and justice first."); Bruce A. Green, *Why Should Prosecutors "Seek Justice"?*, 26 FORDHAM URB. L.J. 607 (1999); Samuel J. Levine, *Taking Prosecutorial Ethics Seriously: A Consideration of the Prosecutor's Ethical Obligation to "Seek Justice" in a Comparative Analytical Framework*, 41 HOUS. L. REV. 1337 (2004).

[33] The ABA has relegated this idea to the comments to the rules. *See* MODEL RULES r. 3.8, cmt. 1 ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons.").

to the same rules as all other lawyers.[34] The rules most relevant to prosecutors are those governing advocacy[35] and dealings with adversarial parties and witnesses.[36] For example, advocates may not knowingly make false statements to the court or knowingly offer or rely on false testimony.[37] They are limited in making public communications while adjudicative proceedings are pending.[38] In jury arguments, they may not assert personal knowledge of the facts or make factual assertions that find no support in the evidence.[39] On their face, advocacy rules such as these apply no more to prosecutors than to other trial lawyers. Moreover, it has been observed that the substance of most other ethics rules has little or no relevance to the work of prosecutors.[40] Rules regulating the lawyer-client relationship are far less applicable to prosecutors than to lawyers representing private clients, and rules regulating a lawyer's legal fees and marketing efforts are entirely irrelevant to prosecutors.[41]

To be sure, courts have the authority to interpret ethics rules more creatively than statutes[42] and to apply these rules differently in the context of prosecutors' work, consistent with prosecutors' unique duty to serve justice.[43] Indeed, in some respects, courts have interpreted generally applicable ethics rules differently—sometimes more restrictively, and sometimes less so—in addressing prosecutors' conduct.[44] For example, courts expect greater candor from prosecutors than from

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[34] Most of the Model Rules are rules of general applicability. The ABA has not responded to suggestions that it craft specialized ethics rules for different areas of law practice. *See, e.g.*, Nancy B. Rapoport, *Our House, Our Rules: The Need for a Uniform Code of Bankruptcy Ethics*, 6 AM. BANKR. INST. L. REV. 45 (1998); Stanley Sporkin, *The Need for Separate Codes of Professional Conduct for the Various Specialties*, 7 GEO. J. LEGAL ETHICS 149 (1993); Fred C. Zacharias, *Reconceptualizing Ethical Roles*, 65 GEO. WASH. L. REV. 169 (1997). The special rule for prosecutors is the most prominent exception. *See infra* notes 51–58 and accompanying text.

[35] *See* MODEL RULES r. 3.3, 3.4 & 3.6.

[36] *See id.*, r. 4.2 & 4.3.

[37] *Id.*, r. 3.3.

[38] *Id.*, r. 3.6.

[39] *Id.*, r. 3.4.

[40] Zacharias, *supra* note 6, at 725–42.

[41] *Id.* at 726–28.

[42] *See* Bruce A. Green, Doe v. Grievance Committee*: On the Interpretation of Ethical Rules*, 55 BROOK L. REV. 485 (1989); Samuel J. Levine, *The Law and the "Spirit of the Law" in Legal Ethics*, 2015 J. PROF. LAW. 1 (2015); Samuel J. Levine, *Taking Ethics Codes Seriously: Broad Ethics Provisions and Unenumerated Ethical Obligations in a Comparative Hermeneutic Framework*, 77 TUL. L. REV. 527 (2003) [hereinafter Levine, *Taking Ethics Codes Seriously*].

[43] *See* Green, *supra* note 32; Levine, *supra* note 32. *But see* Samuel J. Levine, *Judicial Rhetoric and Lawyers' Roles*, 90 NOTRE DAME L. REV. 1989 (2015) (cautioning against applying ethics rules in a way that prevents effective prosecution of deserving criminals).

[44] *See, e.g.*, Kevin C. McMunigal, *Are Prosecutorial Ethics Standards Different?*, 68 FORDHAM L. REV. 1453 (2000); Fred C. Zacharias & Bruce A. Green, *The Uniqueness of Federal Prosecutors*, 88 GEO. L.J. 207 (2000).

other lawyers,[45] but they give prosecutors more latitude than other lawyers to reward witnesses for testifying.[46]

By and large, however, courts have refrained from interpreting ethics rules in a way that would demand more from prosecutors than from lawyers for private parties. For example, ethics rules subject a lawyer to sanction for offering false evidence only if the lawyer knows the evidence is false.[47] While the ABA's non-enforceable guidelines for prosecutors propose a higher standard, exhorting prosecutors to offer evidence only if they reasonably believe it to be true,[48] courts have not interpreted ethics rules to align with this stricter normative expectation for prosecutors. In short, the fact that comparatively few ethics rules apply to prosecutors' work, coupled with courts' general reluctance to interpret the applicable rules expansively in the context of prosecutorial ethics, may help explain why, as a descriptive matter, proportionately fewer prosecutors are publicly disciplined when compared with private practitioners.[49]

The ABA has promulgated one ethics rule that is directed exclusively at prosecutors, Model Rule 3.8. Most notably, Rule 3.8(d), which addresses prosecutors' disclosure obligations, has been found by the ABA to demand more extensive and earlier disclosure than required under constitutional case law,[50] and some courts have agreed.[51] Moreover, the most recent additions, Rule 3.8(g) and (h), address prosecutors' post-conviction obligations,[52] giving substance to the duty to rectify wrongful convictions.[53] Most prosecutors accept the basic premise of these new provisions, though some have raised objections to the wording of the provisions or to the concept that prosecutors' post-conviction decisions, such as

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[45] *See, e.g.*, Bruce A. Green, *Policing Federal Prosecutors: Do Too Many Regulators Produce Too Little Enforcement?*, 8 ST. THOMAS L. REV. 69, 75 & nn.34–36 (1995).

[46] *See, e.g.*, United States v. Singleton, 165 F.3d 1297 (10th Cir. 1999) (en banc) (holding that a prosecutor's provision of leniency in exchange for testimony does not violate federal criminal law prohibiting compensating witnesses); *see also* Zacharias & Green, *supra* note 44, at 221 & n.89 (citing cases rejecting argument that inducements to testify in plea bargaining might violate a federal bribery statute).

[47] MODEL RULES r. 3.3.

[48] ABA CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION § 3-1.4(b) (4th ed. 2015).

[49] Zacharias, *supra* note 6, at 743–65.

[50] ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 09-454 (July 8, 2009), http://www.americanbar.org/content/dam/aba/events/professional_responsibility/2015/May/Conference/Materials/aba_formal_opnion_09_454.authcheckdam.pdf.

[51] *See generally* Bruce A. Green, *Prosecutors' Ethical Duty of Disclosure* in Memory of Fred Zacharias, 48 SAN DIEGO L. REV. 57 (2011).

[52] *See* MODEL RULES r. 3.8(g)–(h).

[53] *See, e.g.*, Warney v. Monroe Cty., 587 F.3d 113 (2d Cir. 2009).

whether and how to investigate closed cases, should be subject to disciplinary oversight.[54]

On the whole, however, Rule 3.8 addresses relatively few aspects of prosecutors' work.[55] Even Rule 3.8(a), the only provision that regulates prosecutors' charging decisions,[56] is essentially limited to restating the constitutional minimum,[57] merely prohibiting prosecutors from pursuing charges that are not supported by probable cause. Many commentators contend that, in their gate-keeping capacity, prosecutors should employ a more demanding standard, and many prosecutors agree.[58] However, the language of Rule 3.8(a) not only leaves to prosecutors the apparently unfettered discretion to decline to bring charges or to seek to dismiss charges, for any reason at all—no matter how ostensibly arbitrary or biased—but also allows prosecutors to bring charges, no matter how unjust or unjustified, as long as the low probable-cause standard is satisfied.

A few state judiciaries have revised or supplemented Rule 3.8(a) to further regulate prosecutors' charging decisions. In Washington D.C., Rule 3.8 provides that a prosecutor shall not "[i]n exercising discretion to investigate or to prosecute, improperly favor or invidiously discriminate against any person,"[59] or "[p]rosecute to trial a charge that the prosecutor knows is not supported by evidence sufficient to establish a prima facie showing of guilt."[60] A recently enacted Massachusetts rule restricts prosecutors' plea bargaining discretion, requiring a prosecutor to "refrain from seeking, as a condition of a disposition agreement in a criminal matter, the defendant's waiver of claims of ineffective assistance of counsel or prosecutorial misconduct."[61] These provisions might be viewed as modest additions to the respective state ethics codes and, even at that, they are exceptional.

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[54] *See, e.g.*, sources cited in Bruce A. Green, *Prosecutors and Professional Regulation*, 25 GEO. J. LEGAL ETHICS 873 (2012); Bruce A. Green & Ellen Yaroshefsky, *Prosecutorial Discretion and Post-Conviction Evidence of Innocence*, 6 OHIO ST. J. CRIM. L. 467 (2009).

[55] *See generally* Bruce A. Green, *Prosecutorial Ethics As Usual*, 2003 U. ILL. L. REV. 1573; Niki Kuckes, *The State of Rule 3.8: Prosecutorial Ethics Reform Since Ethics 2000*, 22 GEO. J. LEGAL ETHICS 427 (2009); Levine, *supra* note 32.

[56] MODEL RULES r. 3.8(a) ("The prosecutor in a criminal case shall . . . refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause.").

[57] *See, e.g.*, Green, *supra* note 55, at 1588–89.

[58] *See, e.g.*, Bennett L. Gershman, *A Moral Standard for the Prosecutor's Exercise of the Charging Discretion*, 20 FORDHAM URB. L.J. 513 (1993); Green, *supra* note 55, at 1589 nn.78–81 (citing sources).

[59] D.C. RULES OF PROF'L CONDUCT r. 3.8(a).

[60] *Id.* r. 3.8(c).

[61] MASS. RULES OF PROF'L CONDUCT r. 3.8(h) (Mass. Court System 2016). The new rule also includes a provision regulating prosecutors' pretrial exercise of investigative discretion, providing that a prosecutor "shall . . . not avoid pursuit of evidence because the prosecutor believes it will damage the prosecution's case or aid the accused." *Id.* r. 3.8(g).

While ethics rules may initially appear to leave much of prosecutors' work unregulated, or to regulate prosecutors too leniently, it would be inaccurate to conclude, as a normative matter, that when courts condemn a prosecutor's conduct as wrongful, ethics rules would rarely apply. Several generally applicable rules, independently or taken together, can be—and, in some cases, have been—read to allow disciplinary responses to prosecutorial misconduct. First, outright illegal conduct, such as prosecutors' violations of discovery rules or court rules, can often be sanctioned under ethics rules that incorporate existing legal provisions.[62] Second, a catch-all provision, prohibiting "conduct that is prejudicial to the administration of justice,"[63] allows for punishment not only for violations of existing law or rules, but also for other prosecutorial misconduct that violates judicial expectations, such that the conduct undermines the fairness of criminal proceedings.[64] Third, a provision forbidding "conduct involving dishonesty, fraud, deceit or misrepresentation"[65] provides a ground to discipline prosecutors for conduct directed at courts, defense lawyers, defendants, or witnesses that, although not involving an outright lie, entails deliberate deception. Fourth, ethics rules hold lawyers, including prosecutors, accountable in some circumstances for misconduct committed by their subordinates or others with whom they work.[66] Finally, the rule establishing lawyers' duty to "provide competent representation"[67] can be read to allow courts to punish prosecutors for some forms of wrongdoing, such as suppression of evidence that, although unintentional or unknowing, is committed through negligence.[68] The competence rule might also be interpreted as a basis for sanctioning prosecutors for failing to take reasonable measures to ensure the truthfulness and reliability of their witnesses or for other failures to take reasonable care to avoid convicting innocent individuals.[69]

It is unclear how far the existing rules can be extended to reach abuses of prosecutorial charging discretion in particular.[70] One might infer that charging decisions are not subject to discipline as long as they satisfy the probable cause requirement of Rule 3.8(a). However, aggressive or creative disciplinary

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[62] MODEL RULES r. 3.4(a)–(c).

[63] *Id.* r. 8.4(d); *see* Levine, *Taking Ethics Codes Seriously*, *supra* note 42, at 558–61.

[64] *See, e.g.*, People v. Chambers, 154 P.3d 419 (Colo. 2006). *See also* Ky. Bar Ass'n, Ethics Op. KBA E-435 (Nov. 17, 2012), https://c.ymcdn.com/sites/www.kybar.org/resource/resmgr/Ethics_Opinions_(Part_2)_/kba_e-435.pdf.

[65] MODEL RULES r. 8.4(c).

[66] *Id.* r. 5.1 & 8.4(a). *Cf. In re* McNally, 901 P.2d 415 (Alaska 1995).

[67] MODEL RULES r. 1.1.

[68] *See generally* Fred C. Zacharias & Bruce A. Green, *The Duty to Avoid Wrongful Convictions: A Thought Experiment in the Regulation of Prosecutors*, 89 B.U. L REV. 1 (2009).

[69] *Id.*

[70] *See, e.g.*, MacLean & Wilks, *supra* note 6, at 75 (observing that "the majority of prosecutorial decisions are guided by prosecutors' internal ethical compasses. . . .").

authorities might address perceived abuses of discretionary authority under at least three other rules. First, where the abusive charging decision appears to be improperly motivated by a prosecutor's desire to advance a third party's interests or the prosecutor's own self-interest, a conflict of interest rule may apply.[71] For example, prosecutors may be subject to discipline under conflict of interest rules for making charging decisions and otherwise participating in criminal cases where they have a past or present lawyer-client relationship, financial relationship or familial relationship with the putative defendant or victim.[72] Conflict rules might also be invoked when prosecutors appear to be advancing less tangible interests, such as their own political self-interest.[73] Second, where the prosecutor has an impermissible purpose for undertaking a prosecution, disciplinary authorities might proceed under Rule 4.4(a),[74] which forbids a lawyer from using means on behalf of a client "that have no substantial purpose other than to embarrass, delay, or burden a third person."[75] Finally, disciplinary authorities might invoke the "conduct that is prejudicial to justice" catch-all provision to address certain perceived abuses of prosecutorial discretion.[76] Although the terms of this rule are

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[71] *See* MODEL RULES, r. 1.7, 1.9, 1.10 & 1.11.

[72] *See, e.g.*, *In re* Ruffin, 54 So. 3d 645 (La. 2011) (suspending prosecutor for threatening criminal charges to help a friend collect on a bounced check); State *ex rel.* Neb. State Bar Ass'n v. Rhodes, 453 N.W.2d 73 (Neb. 1990) (suspending prosecutor who cultivated relationship with defendant by dismissing minor charges and then attempting to coerce a relationship by threatening to file more serious ones). Many of the disciplinary actions have been against part-time prosecutors for conflicts between their public responsibilities and their private practices. *See, e.g.*, *In re* Holste, 358 P.3d 850 (Kan. 2015) (part-time prosecutor suspended for threatening criminal action to gain an advantage for a civil client); Ky. Bar Ass'n v. Ballard, 349 S.W.3d 922 (Ky. 2011) (disciplining part-time prosecutor for negotiating plea agreement with creditor client's manager); *In re* Cole, 738 N.E.2d 1035 (Ind. 2000) (disciplining part-time prosecutor for appearing as a prosecutor in cases involving private clients); *In re* Toups, 773 So. 2d 709 (La. 2000) (sanctioning part-time prosecutor for appearing as prosecutor against spouses of private divorce clients); *In re* Jones, PR 08-0216, slip op. at 1–2 (Mont. June 24, 2009); *In re* Thrush, 448 N.E.2d 1088 (Ind. 1983) (disciplining part-time prosecutor who failed to recuse himself in criminal case filed against a divorce client); Va. State Bar v. Gunter, 11 Va. Cir. 349 (Va. Cir. Ct. 1969) (reprimanding part-time prosecutor who filed bigamy charge against a man while representing the man's wife in a divorce action). *See generally* Richard H. Underwood, *Part-Time Prosecutors and Conflicts of Interest: A Survey and Some Proposals*, 81 KY. L.J. 1 (1992–93).

[73] *See, e.g.*, *In re* State Bar of Ariz. v. Thomas, PDJ-2011-9002, 73–75, 132–35, 137–38, 217–18 (Ariz. Apr. 10, 2012), http://archive.azcentral.com/ic/news/0410Thomas-Aubuchon.PDF; *In re* Disciplinary Proceedings Against Bonet, 29 P.3d 1242 (Wash. 2001) (disciplining prosecutor for offering to dismiss criminal charges against a defendant in exchange for defendant's agreement not testify on behalf of co-defendant).

[74] MODEL RULES r. 4.4(a).

[75] *Id.*; *Thomas*, PDJ-2011-9002, 64–70, 136–37, 212–13.

[76] MODEL RULES r. 8.4(d). *See, e.g.*, *Thomas*, PDJ-2011-9002, 83–87, 218; *In re* Ruffin, 54 So. 3d 645 (La. 2011) (suspending prosecutor for threatening criminal charges to help a friend collect on a bounced check); Iowa Supreme Court Att'y Disciplinary Bd. v. Barry, 762 N.W.2d 129 (Iowa

arguably somewhat vague, courts have imposed discipline for violations of broad ethics provisions, on the grounds that lawyers are generally expected to know what conduct is required of them.[77]

III. DISCIPLINARY ENFORCEMENT OF ETHICS RULES AGAINST PROSECUTORS: A BRIEF DESCRIPTIVE ANALYSIS

For more than a century, state courts have exercised disciplinary authority in response to instances of prosecutorial misconduct.[78] In so doing, courts have, at times, expressly rejected both the argument that, as executive branch officials, state prosecutors should not be subject to judicial regulation,[79] and the argument that, because of the Constitution's Supremacy Clause, federal prosecutors cannot be regulated under state judicial discipline.[80] That said, there is an overwhelming consensus of opinion that ethics rules are under-enforced against prosecutors.[81] Although studies show that state disciplinary authorities sometimes bring proceedings against prosecutors, typically for more egregious forms of misconduct,[82] the perception, as Monroe Freedman observed fifteen years ago, is "that prosecutors are far too infrequently subjected to professional discipline and that courts cannot responsibly defer to disciplinary authorities to oversee prosecutorial misconduct that deprives individuals of fundamental rights."[83]

This perception arises, in part, out of the mismatch between reported wrongdoing and reports of disciplinary punishment. Courts and scholars have identified a wide array of prosecutorial misconduct that violates a variety of

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2009) (suspending prosecutor for forgoing prosecutions in exchange for contributions to sheriff's fund).

[77] *See, e.g.*, Howell v. State Bar of Tex., 843 F.2d 205, 208 (5th Cir. 1988). *See generally* Levine, *Taking Ethics Codes Seriously*, *supra* note 42.

[78] *See infra* Part IV.

[79] *See, e.g.*, Massameno v. Statewide Grievance Comm., 663 A.2d 317 (Conn. 1995). *See infra* Part IV.

[80] *See, e.g.*, *In re* Howes, 940 P.2d 159 (N.M. 1997). This argument seems to have been put to rest by the Citizens Protection Act, popularly known as the McDade Amendment, 28 U.S.C. § 530B. *See generally* Zacharias & Green, *supra* note 44, at 211–24 (discussing history and effect of Act); Hopi Costello, Note, *Judicial Interpretation of State Ethics Rules Under the McDade Amendment: Do Federal or State Courts Get the Last Word*?, 84 FORDHAM L. REV. 201, 236 (2015).

[81] *See, e.g.*, DAVIS, *supra* note 10, at 161; Green, *supra* note 54; Meares, *supra* note 17; Joel B. Rudin, *The Supreme Court Assumes Errant Prosecutors Will Be Disciplined by Their Offices or the Bar: Three Case Studies that Prove That Assumption Wrong*, 80 FORDHAM. L. REV. 537 (2011); Yaroshefsky, *supra* note 9; Brooke Williams & Shawn Musgrave, *Wayward Prosecutors Go Unpunished as Prison Time for Victims Piles Up*, THE EYE (Apr. 3, 2016), http://eye.necir.org/2016/04/03/wayward-prosecutors-go-unpunished-prison-time-victims-piles/.

[82] *See* MacLean & Wilks, *supra* note 6. *See infra* Part IV.

[83] Monroe H. Freedman, *Professional Discipline of Prosecutors: A Response to Professor Zacharias*, 30 HOFSTRA L. REV. 121, 122 (2001).

disciplinary rules.[84] For example, courts have documented numerous violations of prosecutors' discovery obligations, which defense lawyers and some courts assume to be the tip of the iceberg.[85] Courts have identified frequent improprieties in prosecutors' jury arguments, typically finding that the improprieties were "harmless error."[86] Prosecutors have been found to commit various other improprieties, both in and out of court.[87] In contrast, studies suggest, prosecutors have relatively rarely faced public discipline. In a 2001 article, Fred Zacharias concluded that over the course of more than a century, prosecutors had been publicly disciplined for professional misconduct around 100 times, with the largest category of cases involving blatantly illegal conduct such as bribery, extortion, or embezzlement.[88] More recent studies have found that the problem persists.[89]

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[84] Bennett Gershman has been chronicling prosecutorial misconduct for more than three decades. *See generally* BENNETT L. GERSHMAN, PROSECUTORIAL MISCONDUCT (1988).

[85] *See, e.g.*, United States v. Olsen, 737 F.3d 625, 626 (9th Cir. 2013) (Kozinski, C.J., dissenting from denial of rehearing en banc) ("There is an epidemic of *Brady* violations abroad in the land. Only judges can put a stop to it."). *See generally* Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for* Brady *Violations: A Paper Tiger*, 65 N.C. L. REV. 693, 697 (1987) (concluding from reported decisions that prosecutors frequently withhold exculpatory evidence and present false evidence); Joseph R. Weeks, *No Wrong Without a Remedy: The Effective Enforcement of the Duty of Prosecutors to Disclose Exculpatory Evidence*, 22 OKLA. CITY U. L. REV. 833 (1997).

[86] *See, e.g.*, Berger v. United States, 295 U.S. 78, 88 (1935); United States v. Modica, 663 F.2d 1173, 1182 (2d Cir. 1981) (describing "situation with which this Court is all too familiar: a prosecutor has delivered an improper summation, despite this Court's oft-expressed concern over the frequency with which improper prosecution summations occur"); Bell v. State, 723 So. 2d 896, 897 (Fla. Dist. Ct. App. 1998) ("At times it seems as if certain counsel consider the harmless and fundamental error rules to be a license to violate both the substantive law and the ethical rules that prohibit improper argument."); *id.* at 897 (Altenbernd, A.C.J., concurring) ("There are about a dozen bad tactics that this court sees with regularity in closing arguments.").

[87] *See generally* GERSHMAN, *supra* note 84.

[88] Zacharias, *supra* note 6, at 744–46. *See also* Albert W. Alschuler, *Courtroom Misconduct by Prosecutors and Trial Judges*, 50 TEX. L. REV. 629, 670–71 (1972) (finding only one reported instance of a prosecutor being disciplined for courtroom misconduct); CTR. FOR PUB. INTEGRITY, HARMFUL ERROR: INVESTIGATING AMERICA'S LOCAL PROSECUTORS (2003), https://www.publicintegrity.org/accountability/harmful-error.

[89] *See, e.g.*, David Keenan et al., *The Myth of Prosecutorial Accountability After* Connick v. Thompson*: Why Existing Professional Responsibility Measures Cannot Protect Against Prosecutorial Misconduct*, 121 YALE L.J. ONLINE 203 (2011); KATHLEEN RIDOLFI & MAURICE POSSLEY, PREVENTABLE ERROR: A REPORT ON PROSECUTORIAL MISCONDUCT IN CALIFORNIA 1997–2009 (Oct. 2010), http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1001&context=ncippubs; *see also* PROJ. ON GOV'T OVERSIGHT, HUNDREDS OF JUSTICE DEPARTMENT ATTORNEYS VIOLATED PROFESSIONAL RULES, LAWS, OR ETHICAL STANDARDS (Mar. 13, 2014), http://www.pogo.org/our-work/reports/2014/hundreds-of-justice-attorneys-violated-standards.html; AM. CIVIL LIBERTIES UNION, PROSECUTORIAL MISCONDUCT AND CAPITAL PUNISHMENT, https://www.aclu.org/issues/capital-punishment/prosecutorial-misconduct-and-capital-punishment?redirect=blog/tag/prosecutorial-misconduct.

It should be noted that studies are ordinarily limited to reported disciplinary decisions. In some jurisdictions, lawyers are subject to private sanctions—e.g., private reprimands—and studies do not

Moreover, judicial decisions finding that prosecutors engaged in misconduct may understate the extent of the problem, since there are many cases where courts simply decline to adjudicate claims of misconduct, others where defense lawyers perceive misconduct but do not file a complaint, and still others where misconduct is not visible to the defense or the court.

Of course, it is not surprising that disciplinary agencies sometimes decline to pursue prosecutorial misconduct. In general, ethics rules, like criminal laws, are enforced selectively, both because of limited resources and out of a sense of proportionality. Understandably, disciplinary authorities do not demand perfection, but instead pursue the most blameworthy lawyers and the most serious wrongdoing. Many violations of advocacy rules, whether committed by prosecutors or by other lawyers, do not seem to warrant formal discipline. For example, it is not unusual for prosecutors, defense lawyers, and civil lawyers alike to unknowingly make impermissible jury arguments or withhold discoverable evidence, based on either an aggressive reading of the law or a misunderstanding of the applicable standards. In many such scenarios, and even in some cases of minor, albeit intentional, wrongdoing, courts adequately address the misconduct, often informally, at the time it is discovered.[90] Thus, one might reasonably expect and accept that disciplinary proceedings will be limited to instances of misconduct that are intentional, recurring, and/or extremely prejudicial. The problem, however, is that disciplinary authorities have appeared to ignore even serious prosecutorial wrongdoing, as long as the conduct falls short of criminal law breaking.

This situation may appear to be changing. In 2007, elected District Attorney Mike Nifong of Durham, North Carolina, was disbarred for misconduct in the course of a nationally publicized sex-crime prosecution of Duke University lacrosse players who, it turned out, were innocent.[91] Nifong's misconduct included making false statements, withholding exculpatory evidence, and making impermissible statements to the press.[92] Though at the time, some viewed

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capture unreported cases, if any, in which prosecutors were privately reprimanded for misconduct. That said, there is nothing to suggest that in jurisdictions that allow for private disciplinary sanctions, prosecutors are sanctioned privately with any degree of frequency.

[90] *See, e.g.*, State *ex rel.* Okla. Bar Ass'n v. Ward, 353 P.3d 509, 521–22 (Okla. 2015) (citing *In re* Attorney C, 47 P.3d 1167, 1173 (Colo. 2002)) (maintaining that discovery violations should be handled by the trial court).

[91] *See, e.g.*, WILLIAM D. COHAN, THE PRICE OF SILENCE: THE DUKE LACROSSE SCANDAL, THE POWER OF THE ELITE, AND THE CORRUPTION OF OUR GREAT UNIVERSITIES (2014); STUART TAYLOR JR. & KC JOHNSON, UNTIL PROVEN INNOCENT: POLITICAL CORRECTNESS AND THE SHAMEFUL INJUSTICES OF THE DUKE LACROSSE RAPE CASE (2007).

[92] Amended Findings of Facts, Conclusions of Law and Order of Discipline at 22–24, N.C. State Bar v. Nifong, No. 06 DHC 35, Disciplinary Hearing Comm'n of the N.C. State Bar (July 24, 2007), http://www.ncbar.gov/Nifong%20Final%20Order.pdf; Robert P. Mosteller, *The Duke Lacrosse Case, Innocence, and False Identifications: A Fundamental Failure to "Do Justice*,*"* 76 FORDHAM L. REV. 1337, 1346, 1348, 1358 (2007).

Nifong's disbarment as an aberration,[93] there has been a more recent string of disciplinary cases against even more powerful and higher-ranking elected prosecutors. In 2012, Andrew Thomas, who had been a candidate for state Attorney General two years earlier, was disbarred for misconduct committed while serving as the elected prosecutor of Maricopa County in Phoenix, Arizona.[94] In 2013, Phil Kline was indefinitely suspended from practicing law for misconduct committed while serving first as state Attorney General and then as the prosecutor of Kansas's most populous county.[95] And in 2015, Kathleen Kane, the Attorney General of Pennsylvania, was suspended from law practice on a temporary emergency basis, pending criminal charges that she improperly leaked grand jury information and then lied about her conduct.[96] While each case involves unusual and egregious misconduct, and accordingly might be deemed, individually, as aberrational and therefore of limited significance, together these cases suggest that courts and disciplinary authorities in the past decade have become less reluctant to pursue professional discipline of prosecutors who engage in professional improprieties.

Perhaps more notably, these disciplinary proceedings against elected prosecutors appear to have been animated, to varying degrees, by concerns about the abuse of discretionary power. In Nifong's case, what most disturbed the public—and, no doubt, the disciplinary authorities as well—was that he abused his power by continuing the prosecution after the evidence discredited the complaining witness and strongly suggested that the defendants were innocent.[97] Although Nifong's failure to drop the charges at that point was not the official ground for

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[93] *See* Davis, *supra* note 9, at 296–303; David Feige, *One-Off Offing*, SLATE (June 18, 2007, 6:04 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2007/06/oneoff_offing.html ("Prosecutors almost never face public censure or disbarment for their actions. . . . Regardless of Nifong's sanction, the drama leaves prosecutorial misconduct commonplace, unseen, uncorrected, and unpunished."); Zacharias & Green, *supra* note 68, at 12.

[94] *In re* State Bar of Ariz. v. Thomas, PDJ-2011-9002 (Ariz. Apr. 10, 2012), http://archive.azcentral.com/ic/news/0410Thomas-Aubuchon.PDF. Disciplinary charges were also brought against one of his top deputies and a more junior lawyer. The top deputy was disbarred. *In re* Aubuchon, 309 P.3d 886 (Ariz. 2013). The junior lawyer, who had a minor role, was suspended for six months. *In re* Alexander, 300 P.3d 536 (Ariz. 2012).

[95] *In re* Kline, 311 P.3d 321 (Kan. 2013).

[96] Order, Office of Disciplinary Counsel v. Kane, No. 2202 Disciplinary Docket No. 3 (Pa. Sept. 21, 2015), http://www.pacourts.us/assets/opinions/Supreme/out/2202DD3%20-%201023669815398023.pdf. *See also* Petition for Emergency Temporary Suspension, Office of Disciplinary Counsel v. Kane, No. 2202 Disciplinary Docket No. 3 (Pa. Aug. 25, 2015), http://www.pacourts.us/assets/files/setting-4359/file-4699.pdf?cb=5263db [hereinafter Petition]. For earlier cases of high-ranking prosecutors disciplined for criminal conduct, see, for example, Office of Disciplinary Counsel v. Preate, 731 A.2d 129 (Pa. 1999); Mitchell v. Ass'n of the Bar, 351 N.E.2d 743 (N.Y. 1976).

[97] *See* Feige, *supra* note 93 (observing that "if the Duke case had gone to a jury and the defendants had been convicted, Nifong would not only still have his law license—he'd have been lionized for his dogged pursuit of rich white kids").

discipline, the perception that Nifong abused his charging power probably influenced both the aggressiveness of the disciplinary prosecution and the seriousness of the eventual sanction. As Angela Davis noted, most of the charges leading to Nifong's disbarment—other than those regarding his false statements—involved conduct that does not ordinarily catch disciplinary authorities' attention.[98] For example, Nifong was sanctioned in part for misusing the press, even though prosecutors usually receive nothing worse than a judicial tongue-lashing for improprieties in press conferences.[99] Nifong's disbarment was also grounded on his failure to make timely pretrial disclosure of exculpatory evidence, conduct that rarely results in discipline.[100]

In the disciplinary proceedings against former Maricopa County Attorney Andrew Thomas, the abuse of charging power was not only central to the disciplinary charges but also provided one of the principal grounds for his disbarment.[101] In brief, Thomas led his office to battle against members of the Board of Supervisors, with whom he disagreed over whether the Board could retain outside counsel rather than being represented by Thomas's office or his appointees. Among other indiscretions, he investigated and brought criminal charges, most of which were time-barred, against his principal political nemesis, the Chairman of the Board of Supervisors, and later re-indicted the Chairman and indicted a second Supervisor. Then, to forestall a hearing into a motion brought to curtail his investigative efforts, Thomas filed criminal charges against the judge assigned to conduct the hearing, compelling the judge's recusal. The disciplinary panel found that the charges against the judge were entirely baseless, and that even if the charges against the Supervisors were factually supported, it was improper for Thomas to bring them.

The Arizona disciplinary authorities employed, and the disciplinary panel upheld, an unconventional theory to sanction Thomas for abusing his charging power in proceeding against the two Supervisors. Specifically, the panel concluded that even if a prosecution was supported by probable cause, a disciplinary panel can look to the prosecutor's subjective motivations and impose discipline when the prosecutor's reason for bringing criminal charges was to serve his self-interest or to serve some other illegitimate purpose.[102] Applied to Thomas,

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[98] *See* Davis, *supra* note 9, at 297–99.

[99] *See* Abigail H. Lipman, Note, *Extrajudicial Comments and the Special Responsibilities of Prosecutors: Failings of the Model Rules in Today's Media Age*, 47 AM. CRIM. L. REV. 1513, 1537–41 (2010).

[100] *See* Freedman, *supra* note 83.

[101] The disciplinary panel's opinion reviewing 33 charges against Thomas and two of his top aides spans more than 200 pages and more than 500 paragraphs, but the story is well-summarized by the concurring opinion of the panel's non-lawyer member. *See In re* State Bar of Ariz. v. Thomas, PDJ-2011-9002, 233–246 (Ariz. Apr. 10, 2012), http://archive.azcentral.com/ic/news/0410Thomas-Aubuchon.PDF.

[102] *See id.* at 69.

the panel found, first, that his principal purposes for prosecuting the Supervisors were improper, *i.e.*, to exact "political revenge,"[103] and second, that he had a conflict of interest arising out of his "personal animosity."[104] Nevertheless, the hearing panel regarded Thomas's misconduct as aberrational—like that of Mike Nifong, to whom Thomas's disciplinary hearing panel alluded in its report[105]—and it predicted that "its ruling will offer little insight or guidance for other prosecutors," who would be "shocked by [Thomas's] methods and actions."[106] Thus, the panel downplayed both the significance of the legal theory upon which it sanctioned Thomas's abuses of charging discretion, and the potential applicability of that theory to future cases in which prosecutors undertake a personal or political vendetta.

In Kline's case, the alleged misconduct related to his criminal investigation of abortion providers "spanning a period of nearly [six] years with prosecutorial proceedings before six separate courts."[107] He was sanctioned principally for dishonesty and lack of candor in various proceedings, and for allowing sealed documents to be attached to a public filing. None of the disciplinary charges (some of which were found to be unsubstantiated) expressly targeted Kline's abuse of discretion in crusading against abortion providers, and the court steered clear of criticizing Kline for overzealousness and misdirecting his office's resources. Nor did the opinion make the obvious point that, while prosecutors are expected to promote public safety and order, Kline exploited the criminal process in a political vendetta that stoked public outrage and violence. The State Supreme Court's lengthy opinion recounted that Kline's investigation of Dr. George Tiller led to Dr. Tiller's indictment, trial, and acquittal,[108] but the opinion failed to add that Dr. Tiller was assassinated a few months later.[109] Only at the end of the opinion, where it alluded to Kline's "fervid belief or desire to see his cause succeed,"[110] did the court even obliquely suggest that Kline's wrongs included the misdirection of prosecutorial power in a personal, political crusade. Perhaps the disciplinary authorities and the court were indifferent to this concern—or rather, perhaps they were tacitly influenced by it.

Finally, the disciplinary charges against Attorney General Kane related to her abuse of prosecutorial power, following her indictment for intentionally disclosing

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[103] *Id.* at 68.

[104] *Id.* at 73–74.

[105] *See id.* at 11–12.

[106] *Id.* at 22.

[107] *In re* Kline, 311 P.3d 321, 328 (Kan. 2013).

[108] *See id.* at 336.

[109] *See* Joe Stumpe & Monica Davey, *Abortion Doctor Shot to Death in Kansas Church*, N.Y. TIMES (May 31, 2009), http://www.nytimes.com/2009/06/01/us/01tiller.html?pagewanted=all&_r=0.

[110] *Kline*, 311 P.3d at 395.

secret grand jury information. The disciplinary board's petition alleged that after taking office, Kane questioned her predecessor's handling of a 2009 grand jury probe into the alleged misuse of state funds. One of the subjects of the earlier investigation was a current member of a state commission who, at the time of the 2009 grand jury probe, headed a local NAACP chapter. Recognizing that it was impossible to reverse her predecessor's earlier decision not to indict the commissioner, Kane authorized her office to publish a report describing the evidence before the grand jury, allegedly for no legitimate purpose but solely to embarrass him.[111]

These recent examples do not necessarily signal that, as a general matter, disciplinary authorities are becoming more aggressive in pursuing prosecutorial misconduct. After all, these few cases involved extreme and public misconduct by high-ranking public officials, with perhaps limited implications for how disciplinary authorities will deal with less egregious wrongdoing by subordinate prosecutors in cases that escape public attention.

There are, however, some additional signs that, more generally, disciplinary authorities may be taking prosecutorial misconduct more seriously. Although the number of disciplinary cases still remains small compared with the incidence of perceived wrongdoing, it seems that more disciplinary proceedings were brought against prosecutors in the past decade than in previous years.[112] Importantly, some of these cases involved prosecutorial misconduct that courts may have considered fairly low-level.[113] While many courts still appear to punish prosecutors lightly when wrongdoing is found,[114] others regard prosecutorial misconduct as particularly deserving of punishment because it entails a breach of public trust.[115]

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[111] *See* Petition, *supra* note 96. In *In re Russell*, 797 N.W.2d 77 (S.D. 2011), a young elected prosecutor who pursued a criminal case "to enhance and defend his political career," *id.* at 90, misled a judge to secure the improper release of grand jury transcripts in "an effort to protect his personal reputation from increasing public criticism." *Id.* at 89. The court imposed a public censure, attributing the prosecutor's misconduct largely to inexperience. *Id.* at 91. Kane was convicted of criminal conduct and recently sentenced. *See* Associated Press, *Former Pennsylvania Attorney General Sentenced in Perjury Case*, POLITICO (Oct. 24, 2016), http://www.politico.com/story/2016/10/kathleen-kane-sentence-perjury-pennsylvania-attorney-general-230252.

[112] *See, e.g.*, cases cited *infra*, notes 113–19. It should be noted that research into disciplinary decisions is difficult, and generalizations about frequency may miss the mark because not all disciplinary decisions are available through Westlaw and LEXIS. In particular, some decisions are posted on judicial websites but not publicly reported. Therefore, they are not easily located. In addition, some disciplinary decisions, particularly those involving low-level sanctions, may possibly be found only in court files, and not posted electronically. An effort is underway on the website, www.prosecutorialaccountability.com, to identify reports of prosecutorial discipline, but the website is not comprehensive.

[113] *See, e.g.*, *In re* Black, 156 P.3d 641 (Kan. 2007) (publicly censuring prosecutor for mishandling funds).

[114] *See, e.g.*, Disciplinary Counsel v. Phillabaum, 144 Ohio St.3d 417, 2015-Ohio-4346 (Ohio 2015) (one-year suspension for prosecutor who was convicted of falsifying a grand jury indictment);

As another sign of increased and more serious attention to prosecutorial misconduct, disciplinary authorities have sometimes brought proceedings even when the scope of the applicable disciplinary rules was uncertain. In particular, proceedings have been brought when prosecutors withheld favorable evidence that, in hindsight, was not material to the outcome of the trial, and thus its suppression was not a violation of constitutional obligations under *Brady v. Maryland*. Two of the disciplinary cases were brought against federal prosecutors, and incurred the opposition of the U.S. Department of Justice,[116] while others were brought against local prosecutors.[117] In some cases, courts adopted the disciplinary authorities' reading of Rule 3.8(d),[118] demanding broader disclosure than required under

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State *ex rel.* Okla. Bar Ass'n v. Miller, 360 P.3d 508 (Okla. 2015) (reprimanding two prosecutors for lack of candor); State *ex rel.* Okla. Bar Ass'n v. Layton, 324 P.3d 1244 (Okla. 2014) (finding that under the circumstances the prosecutor's lack of candor did not merit any discipline); State *ex rel.* Okla. Bar Ass'n v. Miller, 309 P.3d 108, 120 (Okla. 2013) (terming prosecutor's suppression of evidence in a murder case "reprehensible," but imposing only a 180-day suspension largely because the misconduct occurred decades earlier); *In re* Att'y F, 285 P.3d 322 (Colo. 2012) (en banc) (remanding for consideration of whether a private reprimand, rather than a public censure, is the appropriate sanction for lying to defense counsel); *In re* Humphrey, 811 N.W.2d 363, 375 (Wis. 2012) (imposing 30-day suspension for misleading trial judge); *In re* Kohler, 762 N.W.2d 377 (Wis. 2009) (publicly reprimanding prosecutor who disobeyed a court order, withheld discovery and lied to the judge); *In re* Williams, 663 S.E.2d 181 (Ga. 2008) (imposing six-month suspension of assistant prosecutor following his misdemeanor conviction for assisting the elected prosecutor in misappropriating County funds). *But see* State *ex rel.* Okla. Bar Ass'n v. Wintory, 350 P.3d 131 (Okla. 2015) (suspending Arizona prosecutor for two years for lack of candor, after the Arizona court suspended him for only 90 days for the same conduct); *In re* Smith, 29 So. 2d 1232 (La. 2010) (suspending lawyer for briefly moonlighting as criminal defense lawyer after becoming a prosecutor).

[115] *See, e.g.*, *In re* Howes, 39 A.3d 1, 18 (D.C. 2012) (disbarring federal prosecutor for misusing witness funds and making false statements in connection with witness vouchers, and noting that his "role as a prosecutor heightens the need for deterrence and the potential for harm to the public as a result of his misconduct"); Lawyer Disciplinary Bd. v. Busch, 754 S.E.2d 729, 742 (W. Va. 2014) (imposing three-year suspension for violation of discovery rule and other misconduct, in light of the importance of public trust in public officials).

Many of these disciplinary cases have escaped notice, particularly among the press and the public. Indeed, it seems the national media pays attention only when a prosecutor is disciplined for misconduct in a high-profile case. There was much media coverage when former elected Texas prosecutor Charles Sebesta was disbarred in 2015 for wrongdoing that contributed to the wrongful murder conviction of Anthony Graves, who spent more than 18 years on death row. Likewise, attention was paid in 2013 when former Texas prosecutor Ken Anderson was disbarred for misconduct contributing to the wrongful murder conviction of Michael Morton, who spent 25 years in prison before being exonerated.

[116] Brief and Appendices of Amicus Curiae U.S. in Support of Respondent Andrew J. Kline, *In re* Kline, Bd. Docket No. 11-BD-007 (D.C. June 7, 2012), http://legaltimes.typepad.com/files/usa-amicus-kline-1.pdf; Brief for the U.S. as Amicus Curiae in Support of Appellee Jeffrey Auerhahn and Affirmance, *In re* Auerhahn, No. 11-2206, No. 1:09-MC-10206-RWZ-WGY-GAO (1st Cir. July 23, 2012), 2012 WL 2871540.

[117] *See, e.g.*, *In re* Feland, 820 N.W.2d 672 (N.D. 2012); Disciplinary Counsel v. Kellogg-Martin, 923 N.E.2d 125 (Ohio 2010).

[118] *See, e.g.*, *In re* Kline, 113 A.3d 202 (D.C. 2015) (adopting ABA interpretation); *In re Feland*, 820 N.W.2d 672. *See generally* Green, *supra* note 45.

constitutional precedent, and in other cases, they rejected it.[119] In Massachusetts, after the federal court read the rule narrowly,[120] the state judiciary amended the rule to clarify that it embodied ethical obligations beyond the contours of the constitutional requirements.[121] Disciplinary authorities' willingness to proceed on a contested legal theory, particularly in the face of anticipated government opposition, seems significant, defying expectations that disciplinary proceedings will be initiated only when prosecutors' misconduct is beyond dispute.

It is unlikely that professional discipline will ever be a complete answer to all of the problems, real and perceived, of prosecutorial misconduct. The defense bar, reform organizations, and other vocal critics of prosecutorial abuse of power increasingly view prosecutorial misconduct as a systemic problem, and therefore they advocate for systemic reforms as an alternative preferable to enhanced disciplinary enforcement.[122] Still, one might anticipate that, as public and judicial concerns continue to grow over prosecutorial misconduct, discipline will play an increasingly significant role when prosecutors plainly violate established law and ethics rules governing their conduct as trial lawyers. A more difficult question, addressed in Part IV, is whether ethics rules can and should be expanded, interpreted more liberally, or applied more creatively, to regulate a category of conduct that is often regarded as troubling but is insufficiently addressed by other means: namely, abuses of prosecutorial discretion.

IV. PROFESSIONAL DISCIPLINE FOR ABUSES OF PROSECUTORIAL DISCRETION: A HISTORICAL AND NORMATIVE ANALYSIS

In recent years, prosecutors have faced increasing accusations not only of violating specific legal and ethical obligations, such as the duty to disclose exculpatory evidence,[123] but also of generally abusing their authority, including their broad discretion to decide whether to bring criminal charges and what charges to bring.[124] For example, not-for-profit organizations, media representatives, and members of the public criticized the elected prosecutor in Ferguson for failing to press for an indictment of a police officer responsible for killing an unarmed

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[119] *See, e.g.*, *In re* Auerhahn, 724 F.3d 103 (1st Cir. 2013); *Kellogg-Martin*, 923 N.E.2d 125 (holding that materiality is required under disciplinary rule); State *ex rel.* Okla. Bar Ass'n v. Ward, 353 P.3d 509 (Okla. 2015) (holding that materiality is required under disciplinary rule).

[120] *In re Auerhahn*, 724 F.3d 103.

[121] *See* MASS. RULES OF PROF'L CONDUCT r. 3.8(d) cmt. 3A (2016).

[122] *See, e.g.*, Kozinski, *supra* note 5, at xxvi-xxxii. *See generally* Bruce A. Green & Ellen Yaroshefsky, *Prosecutorial Accountability 2.0*, NOTRE DAME L. REV. (forthcoming 2016).

[123] *See supra* note 85 and accompanying text.

[124] *See supra* notes 10–20 and accompanying text.

civilian, Michael Brown.[125] The U.S. Department of Justice reported that the Missoula County Attorney's Office failed to adequately prosecute sexual assault cases.[126] Congressional committees launched investigations into accusations that federal prosecutors were under-zealous in investigating alleged improprieties by I.R.S. officials,[127] and that federal prosecutors overcharged internet "hacktivist" Aaron Swartz, driving him to suicide.[128]

As a threshold matter, it seems clear that prosecutors should generally be subject to professional sanction when they deliberately violate established constitutional and other legal standards regarding discovery, closing arguments, and other aspects of professional conduct, in and out of court.[129] Discipline plays an important role in promoting lawful conduct and in protecting the public from prosecutors who deliberately act unlawfully. For similar reasons, prosecutors should be subject to discipline when they violate the law through gross or repeated negligence.

It is less clear, however, whether courts can and should sanction prosecutors for abuses of discretionary charging power. Most areas of charging and plea-bargaining decisions are only lightly governed by enforceable law.[130] When

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[125] *See* Letter from Sherrilyn A. Ifill, Dir.-Counsel, NAACP Legal Def. and Educ. Fund, to Hon. Maura McShane, 21st Judicial Circuit, St. Louis County Court (Jan. 5, 2015), http://www.scribd.com/doc/251842888/NAACP-LDF-Open-Letter-to-Judge-Maura-McShane; Nadia Prupis, *Ferguson Prosecutor Hit With Ethics Complaint*, COMMON DREAMS (Jan. 6, 2015), http://www.commondreams.org/news/2015/01/06/ferguson-prosecutor-hit-ethics-complaint. A suit seeking to remove the prosecutor from office was denied. *See Dismissal of Suit Seeking Removal of McCulloch*, ST. LOUIS POST-DISPATCH (July 6, 2015), http://www.stltoday.com/dismissal-of-suit-seeking-removal-of-mcculloch/pdf_76d7eb63-b522-5371-b52d-2589910e5757.html.

[126] *See* Letter from Michael W. Cotter, U.S. Att'y, Dist. of Mont. to Fred Van Valkenburg, Cty Att'y, Missoula County, Mont. (Feb. 14, 2014), https://www.justice.gov/sites/default/files/crt/legacy/2014/02/19/missoula_ltr_2-14-14.pdf.

[127] *See* S. REP. No. 114-119, pt. 1 (2015).

[128] *See* Brian Fung & Andrea Peterson, *After Long Delay, Obama Declines to Rule on Petition Calling for Firing of DOJ Officials Over Aaron Swartz's Suicide*, WASH. POST: THE SWITCH (Jan. 8, 2015), https://www.washingtonpost.com/news/the-switch/wp/2015/01/08/in-a-long-delayed-petition-response-obama-refuses-to-fire-u-s-attorneys-over-aaron-swartz/; Zach Carter, *Al Franken Sends Eric Holder Letter Over 'Remarkably Aggressive' Aaron Swartz Prosecution*, HUFFINGTON POST (Mar. 22, 2013, 3:55 PM), http://www.huffingtonpost.com/2013/03/22/al-franken-eric-holder_n_2934627.html; Zach Carter, *John Cornyn Criticizes Eric Holder Over Aaron Swartz's Death*, HUFFINGTON POST (Jan. 18, 2013, 2:09 PM), http://www.huffingtonpost.com/2013/01/18/john-cornyn-eric-holder-aaron-swartz_n_2505528.html; *see also* Lincoln Caplan, *Aaron Swartz and Prosecutorial Discretion*, N.Y. TIMES: TAKING NOTE (Jan. 18, 2013, 10:06 AM), http://takingnote.blogs.nytimes.com/2013/01/18/aaron-swartz-and-prosecutorial-discretion/ (accusing prosecutors of overcharging); Stephen L. Carter, *The Overzealous Prosecution of Aaron Swartz*, BLOOMBERG: BLOOMBERG VIEW (Jan. 17, 2013, 6:30 PM), http://www.bloomberg.com/news/2013-01-17/the-overzealous-prosecution-of-aaron-swartz.html.

[129] *See supra* notes 35–39 and accompanying text.

[130] *See* Podgor, *supra* note 19; Poulin, *supra* note 19.

prosecutors exercise charging power in violation of constitutional or statutory law—for example, when they initiate charges without probable cause or selectively prosecute in violation of constitutional norms—one might assume that they should be subject to personal discipline. But most charging decisions that critics regard as excessively lenient, excessively harsh, arbitrary, or otherwise abusive are generally thought to be within the broad scope of prosecutorial discretion, unregulated by any established legal restrictions.[131] Indeed, even when critical of prosecutors' exercise of charging discretion, judges ordinarily do not review and supersede prosecutors' charging decisions.[132] As a result, courts have not developed a robust jurisprudence establishing when prosecutors abuse their discretionary power. Likewise, courts and commentators have not deeply analyzed the extent to which professional discipline may be meted out for abuses of charging discretion.

As discussed in Part III, courts conceivably have the ability to establish independent disciplinary standards governing the exercise of prosecutorial discretion, either by liberally interpreting current ethics rules or by adopting new rules. The question is whether doing so is within judicial authority under state constitutional law. On one hand, state courts have general authority to discipline prosecutors for professional misconduct, including constitutional violations.[133] Moreover, it is generally accepted that courts have supervisory authority to adopt and apply ethics rules that go beyond existing constitutional and statutory law, regulating the conduct of trial lawyers, including prosecutors, in their dealings with the courts and other parties.[134] On the other hand, given the apparent limits on adjudicatory review of charging decisions, it is less certain that state courts have

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[131] *See supra* notes 12–20 and accompanying text. *See also* United States v. Redondo-Lemos, 955 F.2d 1296, 1300 (9th Cir. 1992) (as amended on denial of reh'g) ("Our only available course is to deny the defendant a judicial remedy for what may be a violation of a constitutional right—not to have charging or plea bargaining decisions made in an arbitrary or capricious manner.").

[132] *See infra* notes 133–46 and accompanying text; Soares v. Carter, 32 N.E.3d 390, 392 (N.Y. 2015) (citations omitted) ("Under the doctrine of separation of powers, courts lack the authority to compel the prosecution of criminal actions. Such a right is solely within the broad authority and discretion of the district attorney's executive power to conduct all phases of criminal prosecution.").

[133] *See, e.g.*, Bank of Nova Scotia v. United States, 487 U.S. 250, 263 (1988) (noting that prosecutors can be disciplined for misconduct in the grand jury); United States v. Hasting, 461 U.S. 499, 506 n.5 (1983) (noting availability of professional discipline for improper jury argument that, in the context of the case, was harmless error); Imbler v. Pachtman, 424 U.S. 409, 428–29 (1976) (upholding prosecutorial immunity from civil liability for using false evidence and withholding exculpatory evidence, but noting that prosecutors are subject to discipline for violating constitutional rights).

[134] For example, state rules based on ABA Model Rule 4.2, restricting lawyers' communications with represented persons, have been held to apply to prosecutors, notwithstanding that the rules are more restrictive than the Constitution. *See, e.g.*, United States v. Lopez, 989 F.2d 1032 (9th Cir. 1993); *In re* Howes, 940 P.2d 159 (N.M. 1997); *In re* Brey, 490 N.W.2d 15 (Wis. 1992). *See generally* Roger C. Cramton & Lisa K. Udell, *State Ethics Rules and Federal Prosecutors: The Controversies Over the Anti-Contact and Subpoena Rules*, 53 U. PITT. L. REV. 291 (1992).

the authority to establish and enforce disciplinary standards for abuses of prosecutors' charging discretion. The absence of a robust disciplinary jurisprudence regarding abuses of prosecutorial discretion may simply reflect state courts' traditional reluctance to police prosecutors, but it may also reflect state courts' doubts about the scope of their own authority to enforce standards governing prosecutors' charging decisions in particular.

This Part examines the assumption, largely influenced by federal case law, that state courts lack the authority or ability to employ the disciplinary process to regulate prosecutors' charging decisions.[135] It focuses on two questions: first, whether the separation-of-powers considerations that restrain federal courts in adjudication should similarly discourage state courts from undertaking disciplinary inquiries into prosecutors' decision making; and second, assuming such inquiries may be undertaken, whether state courts, pursuant to their power to adopt ethics rules, may apply their own standards governing prosecutors' decision making or are limited to enforcing constitutional and statutory standards.

A. *State Court Disciplinary Review of Prosecutorial Decision Making*

It is often assumed, based on the federal court model, that courts have minimal authority to review prosecutors' charging and plea bargaining decisions and other discretionary decisions.[136] The federal constitutional case law sets a high bar to a criminal defendant who claims to have been charged selectively, vindictively, or discriminatorily in violation of the Constitution,[137] and the constitution affords no judicial review at all of a prosecutor's decision to refrain from filing a criminal charge when victims or members of the public believe that prosecutors have not lived up to their responsibilities.[138] Federal courts have limited statutory authority to oversee certain discretionary decisions, such as a prosecutor's decision to dismiss charges after they have been filed,[139] and some federal courts regard this authority as meaningful,[140] but most federal courts remain highly deferential to prosecutors' charging decisions.[141]

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[135] *See Barkow*, supra note 12.

[136] *See, e.g.*, United States v. Redondo-Lemos, 955 F.2d 1296 (9th Cir. 1992) (as amended on denial of reh'g); *see also* Darryl K. Brown, *Judicial Power to Regulate Plea Bargaining*, 57 WM. & MARY L. REV. 1225 (2016), 1234–39 nn.19–43 and accompanying text (citing U.S. Supreme Court and other federal court cases).

[137] *See, e.g.*, United States v. Armstrong, 517 U.S. 456 (1996); Blackledge v. Perry, 417 U.S. 21 (1974).

[138] *See, e.g.*, United States v. Cox, 342 F.2d 167 (5th Cir. 1965).

[139] *See, e.g.*, FED. R. CRIM. P. 48(a) ("The government may, *with leave of court*, dismiss an indictment, information, or complaint." (emphasis added)).

[140] *See* United States v. Abreu, 747 F. Supp. 493, 502 (N.D. Ind. 1990) ("[I]t seems altogether proper to say the phrase 'by leave of court' in Rule 48(a) was intended to modify and condition the absolute power of the executive, consistently with the framers' concept of separation of powers, by

The premise of prosecutorial discretion is that once there is sufficient evidence to support criminal charges, a variety of public policy considerations go into the determination of whether the public interest is served by bringing or pursuing a criminal case,[142] and that prosecutors are best positioned to make this judgment.[143] Courts recognize the potential for prosecutors to abuse their discretion; at times, for example, prosecutors exercise discretion not just unwisely, but arbitrarily or in bad faith.[144] The appropriate remedy, however, may be found in the political, rather than the judicial, process.[145]

If, indeed, courts are unable to meaningfully remedy prosecutors' abuses of charging and plea bargaining discretion in criminal cases over which they preside, it might follow that courts likewise do not have the ability to punish prosecutors' abuses of discretion through the after-the-fact disciplinary process. Presumably, the justifications for judicial deference to prosecutors' discretionary decisions apply just as strongly in the disciplinary context as in criminal adjudication.

Courts and scholars have identified various reasons that, both as a matter of constitutional separation of powers and as a matter of prudence, federal courts only lightly review prosecutors' discretionary decisions.[146] As executive branch

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erecting a check on the abuse of executive prerogatives."); United States v. Freedberg, 724 F. Supp. 851, 856 (D. Utah 1989) ("Rather than the court's action constituting a usurpation of the Executive power and interference with *prosecutorial* discretion . . . in this court's view the narrow interpretation of 'leave of court' as advocated in the Joint Motion and applied in this case would constitute violation of principles of separation of powers because of interference with *judicial* discretion." (emphasis in original)).

[141] *See* Barkow, *supra* note 22, at 872 ("[F]ederal judges continue to rubber stamp cooperation, charging, and plea decisions."). *See, e.g.*, United States v. Fokker Servs. B.V., 818 F.3d 733, 743 (D.C. Cir. 2016) ("[C]onstrue the 'approval of the court' language in [18 U.S.C.] § 3161(h)(2) in a manner that preserves the Executive's long-settled primacy over charging decisions and that denies courts substantial power to impose their own charging preferences.").

[142] *See, e.g.*, ABA CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION § 3-3.9 (3d ed. 1993).

[143] *See, e.g.*, Pugach v. Klein, 193 F. Supp. 630, 634–35 (S.D.N.Y. 1961).

[144] *See, e.g.*, State *ex rel.* McKittrick v. Wallach, 182 S.W.2d 313 (Mo. 1944).

[145] *See, e.g.*, Editorial, *Voters Tell D.A.s, Black Lives Matter*, N.Y. TIMES, Mar. 18, 2016, at A26 (veteran prosecutors in Cleveland and Chicago were denied renomination in Democratic primaries for mishandling cases of police shootings of civilians).

[146] *See, e.g.*, Bibas, *supra* note 12, at 970–71 (citing various rationales courts have invoked for the deferential approach to reviewing prosecutors' charging decisions, including judges' views that "they are less competent to weigh all the relevant factors," the concern that "revealing prosecutorial information could 'chill law enforcement . . . [and] undermine prosecutorial effectiveness'" and case law holding that "[t]he separation of powers . . . forbids judicial interference with prosecutorial discretion to decline to file charges"); *id.* at 973 ("Judicially enforceable models of equality are poorly suited to balance the myriad practical and policy considerations that prosecutors legitimately take into account."); Davis, *supra* note 13, at 408–15 (citing various ways the law insulates prosecutors' abuse of discretion from effective judicial review, including the harmless error doctrine, obstacles to discovery, civil immunity, and a general reluctance among courts to exercise their supervisory power out of concern for the separation of powers); Podgor, *supra* note 19, at 463; Poulin, *supra* note 19, at 1119; Vorenberg, *supra* note 10, at 1546 ("Courts often justify their refusal

officials, prosecutors, not courts, are generally entrusted with charging authority, and the review of those decisions would entangle courts in core executive decision-making.[147] In addition, courts arguably have no greater expertise than prosecutors in determining how to identify and balance relevant public policy considerations that bear on charging decisions.[148] Relatedly, prosecutors have greater access to the facts relevant to charging decisions—both the facts of the particular case and general background facts.[149] As a result, judicial fact-finding would be time-consuming and duplicative, and would potentially intrude on the confidentiality of particular criminal investigations and the general workings of the prosecutor's office.[150]

To the extent these considerations are compelling in the context of criminal adjudication, they would seem likewise to weigh against disciplinary review of prosecutors' charging decisions and other discretionary decisions.[151] This is not to

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to review prosecutorial discretion on the ground that separation-of-powers concerns prohibit such review. . . . The hands-off approach of the courts seems to reflect their view . . . that it would be unwise to interfere with prosecutors' ability to manage the business of criminal justice."). *See also* Stephens, *supra* note 17, at 57 n.31, 64 n.82 (citing cases).

[147] *See, e.g.*, United States v. Redondo-Lemos, 955 F.2d 1296, 1299–1300 (9th Cir. 1992) (as amended on denial of reh'g) ("It would raise serious separation of powers questions—as well as a host of virtually insurmountable practical problems—for the district court to inquire into and supervise the inner workings of the United States Attorney's Office. . . . The court would also have to consider the validity of various rationales advanced for particular charging decisions, which would enmesh it deeply into the policies, practices and procedures of the United States Attorney's Office. . . . Such judicial entanglement in the core decisions of another branch of government—especially as to those bearing directly and substantially on matters litigated in federal court—is inconsistent with the division of responsibilities assigned to each branch by the Constitution.").

[148] *See, e.g., id.* at 1299 ("Prosecutorial charging and plea bargaining decisions are particularly ill-suited for broad judicial oversight. In the first place, they involve exercises of judgment and discretion that are often difficult to articulate in a manner suitable for judicial evaluation."); *id.* at 1300 ("[T]he court would have to second-guess the prosecutor's judgment in a variety of cases to determine whether the reasons advanced therefor are a subterfuge.").

[149] *Id.* at 1299 ("Such decisions are normally made as a result of careful professional judgment as to the strength of the evidence, the availability of resources, the visibility of the crime and the likely deterrent effect on the particular defendant and others similarly situated.").

[150] *Id.* at 1299–1300 ("The very breadth of the inquiry—whether the prosecutor's discretion was exercised in an arbitrary or capricious fashion—would require that the government divulge minute details about the process by which scores, perhaps hundreds, of charging decisions are made.").

[151] Notably, some lower federal courts seem to assume that state courts have disciplinary authority to punish prosecutors' abuses of charging discretion, notwithstanding the high level of deference traditionally accorded in federal criminal adjudication. *See, e.g.*, Soulier v. Haukaas, 477 Fed. Appx. 388, 390 (7th Cir. 2012) (finding prosecutor entitled to immunity for any violation of plea-bargaining power "because plea bargaining is intimately associated with a prosecutorial function. . . . [a]nd other means of correcting injustice, such as . . . professional discipline, are available to hold accountable prosecutors who abuse their power"); Harrington v. Almy, 977 F.2d 37, 42 (1st Cir. 1992) (citing ME. REV. STAT. ANN. tit. 30–A, § 257) (identifying "professional discipline of the miscreant prosecutor as the readily available safeguards against constitutional abuse" and distinguishing between "the federal judicial system where the power of the courts to control a

say that these considerations are implicated to precisely the same degree in each context. For example, confidentiality concerns are arguably less serious in the disciplinary context, where review can be undertaken in camera.[152] On the other hand, concerns about chilling prosecutors may be even more compelling in the disciplinary context, as the risk of personal consequences may chill some prosecutors from making some hard, but legitimate, decisions, and may altogether discourage other capable lawyers from becoming prosecutors.[153]

Still, notwithstanding these considerations, there are reasons to question the common assumption that discipline cannot address abuses of prosecutorial discretion. Significantly, most criminal prosecutions are adjudicated by state courts, some of which have not adopted federal courts' deferential approach to prosecutorial decision-making based on separation of powers considerations. As Darryl Brown has recently documented, "some states have recognized the judicial capacity for a modest supervisory role over critical aspects of prosecutorial discretion" and "some state courts have departed from federal conceptions of separation of powers."[154] In fact, it appears that many state courts recognize adjudicatory authority, pursuant to state statute or common law, to review various aspects of prosecutors' charging decisions.

For example, in some states, courts may inquire into whether the prosecutor acted improperly in failing to initiate criminal charges and, upon finding an impropriety, they may direct the prosecutor to bring the case to trial[155] or appoint a special prosecutor to do so.[156] Typically, review of the non-charging decision is

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prosecutor's term are strictly limited" and the enhanced judicial authority in state law, including Maine statute "provid[ing] a highly specific mechanism to evaluate a prosecutor's work[,]. . . . permit[ting] a judicial proceeding to be commenced against a District Attorney, upon complaint by the Attorney General, to determine whether the District Attorney is 'performing the duties of office faithfully and efficiently' and to remove him if he is not").

[152] *See, e.g.*, Massameno v. Statewide Grievance Comm., 663 A.2d 317, 335 (Conn. 1995) (rejecting argument that disciplinary review of prosecutors would have adverse effect on the confidentiality of prosecutors' charging decisions, noting that, unlike an adjudicatory proceeding held in open court, "[s]ensitive material contained within a response to a grievance complaint . . . can be sealed upon motion").

[153] *See, e.g.*, *Redondo-Lemos*, 955 F.2d at 1299 ("[A] court would find it nearly impossible to lay down guidelines to be followed by prosecutors in future cases. We would be left with prosecutors not knowing when to prosecute and judges not having time to judge."). The Supreme Court has identified similar concerns as underlying the doctrine of immunity for prosecutors. *See* Imbler v. Pachtman, 424 U.S. 409, 422–24 (1976).

[154] Brown, *supra* note 136, at 1250–51. *See id.* at 1251–53 nn.94–103 and accompanying text.

[155] *See, e.g.*, MICH. COMP. LAWS. ANN. § 767.41; NEB. REV. STAT. § 29-1606. *See also*, Brown, *supra* note 136, at 1252 n.99.

[156] *See, e.g.*, TN CONST. art. 6, § 5; UTAH CONST. art. 8, § 16; ALA. CODE § 12-17-186(a); WYO. STAT. ANN. § 9-1-805; State *ex rel*. Wild v. Otis, 257 N.W.2d 361, 364–65 (1977) (citing MINN. STAT. § 388.12); Kailey v. Chambers, 261 P.3d 792 (Colo. App. 2011) (citing COLO. REV. STAT. Ann. § 16-5-209); State v. Muller, 588 A.2d 393, 396 (N.J. Super. Ct. App. Div. 1991); Wilson v. Koppy, 653 N.W.2d 68, 72 (N.D. 2002) (citing N.D. CENT CODE § 11-16-06).

initiated by complaint of a private party,[157] growing out of the tradition of private prosecution that extends back to the nineteenth-century.[158] Similarly, various state courts have authority to deny the prosecutor's motion to dismiss a criminal charge where there is sufficient evidence to support continuing the prosecution.[159]

Insofar as state courts' review of charging decisions is based on an evaluation of the strength of the evidence—*e.g.*, whether there is probable cause or a prima facie case of guilt—it might seem that the courts are making a traditionally adjudicatory decision, rather than questioning the prosecutor's exercise of judgment.[160] It is clear, however, that state court review of prosecutors' discretionary decisions is not always limited to weighing the evidence of guilt. In some states, trial courts have the authority to supersede a prosecutor's charging decision by dismissing a charge on their own motion in the interests of justice[161] or

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[157] *See, e.g.*, N.J. MUN. CT. R. 7:2-2(a)(1); OHIO REV. CODE ANN. § 2935.09(D) (West 2015); 16 PA. STAT. AND CONS. STAT. ANN. § 1409; PA. R. CRIM. P. 506; WIS. STAT. § 968.02(3); WIS. STAT. § 968.26; State v. Murphy, 584 P.2d 1236, 1241 (Idaho 1978); State v. Martineau, 808 A.2d 51, 52–53 (N.H. 2002); Cronan *ex rel.* State v. Cronan,774 A.2d 866, 872 (R.I. 2001); Harman v. Frye, 425 S.E.2d 566, 576 (W. Va. 1992); State *ex rel*. Kalal v. Cir. Ct. for Dane County, 681 N.W.2d 110 (Wis. 2004).

[158] *See* Beth A. Brown, Note, *The Constitutional Validity of Pennsylvania Rule of Criminal Procedure 133(b)(2) and the Traditional Role of the Pennsylvania Courts in the Prosecutorial Function*, 52 U. PITT L. REV. 269 (1990); Stuart P. Green, Note, *Private Challenges to Prosecutorial Inaction: A Model Declaratory Judgment Statute*, 97 YALE L.J. 488 (1988); Comment, *Private Prosecution: A Remedy for District Attorneys' Unwarranted Inaction*, 65 YALE L.J. 209 (1955); Kenneth L. Wainstein, Comment, *Judicially Initiated Prosecution: A Means of Preventing Continuing Victimization in the Event of Prosecutorial Inaction*, 76 CAL. L. REV. 727 (1988).

[159] *See, e.g.*, PA. R. CRIM. P. 585(A); TENN. R. CRIM. P. 48(a); Manning v. Engelkes, 281 N.W.2d 7, 10–11 (Iowa 1979); Myers v. Frazier, 319 S.E.2d. 782, 792 n.13 (W. Va. 1984); State v. Kenyon, 270 N.W.2d. 160, 163 (Wis. 1978). *See also Manning*, 281 N.W.2d at 13 (distinguishing state and federal approaches to judicial role in prosecutorial dismissals); State v. Layman, 214 S.W.3d 442, 451 (Tenn. 2007). *See generally* Brown, *supra* note 136, at 1246–47 nn.76 & 78.

[160] *See, e.g.*, Commonwealth v. Stivala, 645 A.2d 257 (Pa. Super. Ct. 1994) (upholding PA. R. CRIM. P. 313):

> [I]t is apparent that the determination of whether there was sufficient evidence to sustain a *prima facie* case is ultimately a judicial one and subject to the trial court's determination. . . . Based on that pretrial state of the evidence, [the trial court] determined that there was sufficient evidence to make out a *prima facie* case and, therefore, denied the Commonwealth's motion for *nolle prosequi*. We cannot say that the trial court abused its discretion in ruling as it did.

Id. at 262.

[161] *See* State v. Echols, 793 P.2d 1066, 1071 (Alaska Ct. App. 1990) (citing ALASKA R. CRIM. P. 43(c); CAL. PENAL CODE § 1385; IDAHO R. CRIM. P. 48(a)(2); IOWA R. CRIM. P. 27(1); MINN. STAT. § 631.21; MONT. CODE ANN. § 46-13-201; N.Y. CRIM. PROC. LAW § 210.40; OKLA. STAT. tit. 22, § 815; OR. REV. STAT. § 135.755; P.R. R. CRIM. P. 247(b); UTAH CODE ANN. § 77-51-4; VT. R. CRIM. P. 48(b)(2); WASH. R. CRIM. P. 8.3)). *See also* People v. Rickert, 446 N.E.2d 419, 420 (N.Y. 1983) (citations omitted) ("Although the current version of [the "interests of justice" statute] is, in substantial part, the product of its recent amendment, the inherent power it bespeaks has ancient roots. . . . [I]t had a respected place in the common law."); State v. Knapstad, 706 P.2d 238, 240–41

in light of the triviality of the offense.[162] Notably, when dismissing charges "in the interest of justice," the court is substituting its judgment for that of the prosecutor, without necessarily finding misconduct in the form of prosecutorial abuse, arbitrariness or bad faith. In some states, courts may review other discretionary decisions, such as prosecutors' decisions regarding pretrial diversion, that plainly call for weighing various policy considerations, not merely assessing the strength of the evidence.[163]

State courts that engage in more substantial review of prosecutorial decision making than their federal counterparts have been undeterred by state constitutional principles of separation of powers. In general, state courts exercise a broader form of judicial authority, both when they review prosecutors' charging decisions[164] and when they review other discretionary decisions.[165] To some degree, their practice

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(Wash. Ct. App. 1985) (courts have authority "in the furtherance of justice" to dismiss any criminal prosecution due to "arbitrary action or governmental misconduct," as well as "the inherent authority . . . to dismiss for insufficiency of the charge"). *See generally* Valena Elizabeth Beety, *Judicial Dismissal in the Interest of Justice*, 80 MO. L. REV. 629 (2015); Brown, *supra* note 136, at 1248 nn.79–81 and accompanying text.

[162] *See, e.g.*, 9 GUAM CODE ANN. § 7.67 (1996); HAW. REV. STAT. § 702-236 (1993); ME. REV. STAT. tit. 17-A, § 12 (West 1983); N.J. STAT. ANN. § 2C:2-11 (West 1995); 18 PA. STAT. AND CONST. STAT. ANN. § 312 (West 1998). *See generally* Brent G. Filbert, Annotation, *Defense of Inconsequential or De Minimis Violation in Criminal Prosecution*, 68 A.L.R. 5th 299 (1999).

[163] *See, e.g.*, Commonwealth v. Ayers, 525 A.2d 804 (Pa. Super. Ct. 1987) (upholding PA. R. CRIM. P. 179(c)). *But see* Commonwealth v. Cline, 800 A.2d 978 (Pa. Super. Ct. 2002). *See also* TENN. CODE ANN. § 40–15–105(b)(3); State v. Lavorgna, 437 A.2d 131, 137–38 (Conn. Super. Ct. 1981); State v. Dalgish, 432 A.2d 74 (N.J. 1981); State v. Webb, No. E2009-02507-CCA-R9-CD, 2011 WL 5332862, at *9 (Tenn. Crim. App. Nov. 7, 2011) (citing cases).

[164] *See* Brown, *supra* note 136. *See also* State v. Unnamed Defendant, 441 N.W.2d 696, 698 (Wis. 1989) (overruling State *ex rel.* Unnamed Petitioners v. Connors, 401 N.W.2d 782 (Wis. 1987)) (upholding judicial authority to investigate criminal allegations and initiate criminal charges, and overruling earlier decision, on the ground that "the premise of [the previous case]—that initiation of criminal prosecution is an exclusively executive power in Wisconsin—is erroneous"); Frank J. Remington & Wayne A. Logan, *Frank Miller and the Decision to Prosecute*, 69 WASH. U. L.Q. 159 (1991); Wayne A. Logan, Comment, *A Proposed Check on the Charging Discretion of Wisconsin Prosecutors*, 1990 WIS. L. REV. 1695.

[165] *See, e.g.*, People v. Ford, 331 N.W.2d 878, 898 (Mich. 1982) (Levin, J., dissenting) (calling on court to reject prosecutorial practice of charging a defendant with a felony for conduct that could have been charged as a misdemeanor, on the grounds that "[t]he separation of powers is not absolute" and "[t]he manner in which [the prosecutor] exercises that legislatively delegated power is subject to judicial review"); State v. Krotzer, 548 N.W.2d 252, 254–55 (Minn. 1996) (holding that judicial stay of adjudication does not violate separation of powers and citing precedent for the proposition that the trial "decision to stay adjudication of Krotzer's charge instead of accepting his guilty plea fell within the 'inherent judicial power' we have repeatedly recognized, and was necessary to the furtherance of justice"); State v. Leonardis, 375 A.2d 607 (N.J. 1977) (holding that separation of powers does not preclude judicial review of prosecutors' pretrial diversion decisions). *See* Brown, *supra* note 136, at 1248 n.81, 1251 n.96. *But see* People v. Thomas, 109 P.3d 564, 568 35 Cal. 4th 635, 642 (Cal. 2005) (holding that statutory requirement "that the criminal court must secure the prosecutor's consent before it can order a Youth Authority commitment violates the state Constitution's separation of powers doctrine"); *id.* at 566–68 (citing cases).

may reflect a different theoretical approach than that of the federal courts. By way of comparison, criminal prosecutors' discretionary decisions are reviewed by courts in other countries.[166] Though, perhaps of limited direct relevance,[167] practices outside the United States may cast doubt on federal courts' assumptions about the detriment of such judicial review. More generally, as scholars have noted, federal courts' views regarding separation of powers in the criminal context are far from unassailable,[168] and state courts have been and remain entitled to see things differently. In part, state courts' more liberal approach to judicial authority in criminal cases may simply reflect a different history.[169]

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[166] Some scholars have pointed to continental law models, such as the German system, in which "[d]ecisions to prosecute or not prosecute are subject to review by a judge." George C. Thomas, III, *Discretion and Criminal Law: The Good, the Bad, and the Mundane*, 109 PENN ST. L. REV. 1043, 1057 (2005). *See also* Brown, *supra* note 136, at 1255 n.107 and accompanying text; Yue Ma, *A Comparative View of Judicial Supervision of Prosecutorial Discretion*, 44 CRIM. L. BULL. Jan.-Feb. 2008 (2008).

[167] For expressions of skepticism, see, for example, Pizzi, *supra* note 26, at 1351–62. *See also* Máximo Langer, *Rethinking Plea Bargaining: The Practice and Reform of Prosecutorial Adjudication in American Criminal Procedure*, 33 AM. J. CRIM. L. 223 (2006); Erik Luna & Marianne Wade, *Prosecutors as Judges*, 67 WASH. & LEE L. REV. 1413 (2010).

[168] Separation of powers questions are a source of perennial debate. In particular, some scholars question the basis for federal courts' reliance on separation of powers as a ground for a highly deferential approach to prosecutors' charging decisions. *See, e.g.*, Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 993 (2006); Brown, *supra* note 136, *passim*; Rebecca Krauss, *The Theory of Prosecutorial Discretion in Federal Law: Origins and Developments*, 6 SETON HALL CIR. REV. 1, 13 (2009). *See also* Sarah J. Cox, *Prosecutorial Discretion: An Overview*, 13 AM. CRIM. L. REV. 383, 397 (1976); Kenneth Culp Davis, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 210 (1969); Jonathan L. Entin, *Separation of Powers, the Political Branches, and the Limits of Judicial Review*, 51 OHIO ST. L.J. 175, 204 (1990); Harold J. Krent, *Executive Control Over Criminal Law Enforcement: Some Lessons From History*, 38 AM. U. L. REV. 275 (1989). *Cf.* Smith v. Meese, 821 F.2d 1484, 1490 (11th Cir. 1987) ("In considering the separation of powers[,] . . . we start with the proposition that there is nothing inherent in the prosecutorial function that would suggest insulating prosecutorial policies from judicial review.").

If anything, at least one scholar suggests the degree of authority exercised by federal prosecutors contradicts constitutional principles of separation of powers. *See* Barkow, *supra* note 22, at 871. *Cf.* Davis, *supra* note 13, at 453, 456.

[169] *See, e.g.*, Commonwealth v. Stivala, 645 A.2d 257, 261 (Pa. Super. Ct. 1994) (noting that although "[h]istorically, at common law, a prosecutor had the authority to enter a *nolle prosequi* on his own motion. . . . [t]his unfettered power was modified by" Pennsylvania statutes in 1850 and 1860, "which required that before a *nolle prosequi* could be entered, the assent of the proper court must be obtained"); State v. Conger, 797 N.W.2d 341, 366 (Wis. 2010) (Abrahamson, C.J., concurring) ("Even a brief review of the history of the relative powers of the district attorney and trial court in criminal cases thus demonstrates the basic point that there are historically shared powers between the executive and judicial branch relating to charging and amending or dismissing charges."); State v. Unnamed Defendant, 441 N.W.2d 696, 698, 699 (Wis. 1989) (noting that the "John Doe criminal proceeding has a long history in Wisconsin. . . . [and] has been used by courts, pursuant to statute, since 1839" and that "the same procedure we review today was in use in 1848, and was presumably considered constitutionally sound by the framers themselves"); *id.* at 700 (noting

Perhaps more to the point, state courts have regularly exercised disciplinary review of various aspects of prosecutors' decision making. In the first half of the twentieth century, state courts exercised regulatory and disciplinary authority in a manner that required close judicial scrutiny of prosecutors' charging decisions, notwithstanding arguable concerns about confidentiality and separation of powers.[170] In particular, courts sanctioned prosecutors for failures to prosecute when there was sufficient evidence upon which to file charges. In some instances, prosecutors were disciplined for systematically refusing to bring certain charges, typically involving gambling, prostitution or the illegal sale of alcohol.[171] In others, prosecutors were punished for failing to prosecute specific individuals.[172]

It should be noted that these cases, arguably, do not illustrate an expansive exercise of judicial disciplinary authority over prosecutors' discretionary decisions.

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that the statute has stood "substantially unchanged" for more than one hundred and fifty years, during which time "judicial initiation of criminal prosecution[]has never appeared to be considered to be inconsistent with the doctrine of separation of powers"); *id.* at 700 n.4, 700–01 (citing Samuel Becker, *Judicial Scrutiny of Prosecutorial Discretion in the Decision Not to File a Complaint*, 71 MARQ. L. REV. 749 (1988)) (noting that "prior to 1945, the filing of a criminal complaint was not only allowable as a judicial prerogative, it was probably exclusively a judicial responsibility"); *id.* at 700 (citing historical record "cast[ing] grave doubt" on the argument that under the 1969 statute, "the charging power was, as a matter of constitutional law, exclusively within the province of the executive"). *See also* Ronald F. Wright, *Prosecutorial Guidelines and the New Terrain in New Jersey*, 109 PENN ST. L. REV. 1087 (2005) (analyzing New Jersey Attorney General's issuance of "Brimage Guidelines" for plea bargains, in response to New Jersey Supreme Court decisions). *But see* State v. Cotton, 769 So. 2d 345 (Fla. 2000) (rejecting New Jersey's approach to separation of powers).

[170] *See infra* note 174. *See also* Massameno v. Statewide Grievance Comm., 663 A.2d 317, 326 (Conn. 1995) (citations omitted) ("It is well established that the judicial branch has the inherent power to investigate the conduct of an officer of the court. 'The Superior Court possesses inherent authority to regulate attorney conduct and to discipline the members of the bar.'"); *id.* at 327 ("Like all attorneys, prosecutors serve as officers of the court. Therefore, since the days of the Connecticut colony, they have been subject to judicial control"); *id.* ("[T]race the history of prosecutorial power in Connecticut to understand the extent to which the judiciary may permissibly interfere with that power"); *id.* ("Unlike its federal counterpart, state prosecutorial power arose initially from the common law. The principle of public prosecution for crimes against the sovereign originated in colonial times. Prosecutors were appointed by and answerable to the sovereign because public justice could not depend upon the financial resources of victims."); *id.* ("Because prosecutors were viewed as ministers of justice, their duties were . . . considered quasi-judicial and 'not purely those of an executive officer.'"); *id.* at 331 (finding "nothing in the history of the office of the state's attorney that has required the judicial branch to abdicate its inherent role in the supervision of the bar in favor of the executive branch or that has vested the exclusive power to discipline a prosecutor in the executive branch"); *id.* at 332 ("The judiciary is ultimately responsible for the enforcement of the court rules and must use its inherent power over the administration of justice to prevent action that undermines the integrity of the system.").

[171] *See, e.g.*, *In re* Graves, 146 S.W.2d 555 (Mo. 1941); *In re* Voss, 90 N.W. 15 (N.D. 1902); *In re* Simpson, 83 N.W. 541 (N.D. 1900). *See* Zacharias, *supra* note 6, at 748 n.95. *See generally* MacLean & Wilks, *supra* note 6; Note, *District Court Discipline of State Prosecutor for Failure to Enforce State Laws*, 57 YALE L.J. 125 (1947).

[172] Commonwealth *ex rel.* v. Stump, 57 S.W.2d 524 (Ky. 1933); *In re* Burton, 246 P. 188 (Utah 1926); *In re* Wakefield, 177 A. 319 (Vt. 1935).

It appears that in the early twentieth century, prosecutors were expected to bring charges in all cases supported by the evidence, without taking into account policy considerations that might favor declining to prosecute. Accordingly, the disciplinary inquiry in cases of failure to prosecute was presumably limited to a determination of whether there was sufficient evidence to support prosecution, without the need to second-guess a prosecutor's discretionary judgment. The same limitations would seem to apply in contemporary disciplinary proceedings brought against prosecutors for filing charges that were unsupported by probable cause,[173] in violation of ethics rules based on Model Rule 3.8(a), or its predecessor.[174] Although this inquiry potentially requires disclosure of aspects of the prosecutor's investigation, a court's principal task involves determining the strength of the evidence, a task that courts regularly undertake in adjudication as well.

Other forms of disciplinary inquiry call into question the motivations for prosecutors' charging decisions, in a way that illustrates a more direct rejection of the concerns underlying the federal case law. For example, prosecutors have been held to be subject to discipline for accepting a bribe or gratuity in exchange for declining to prosecute or dismissing charges,[175] or for failure to prosecute a serious crime as a result of the lawyer's "grossly negligent" lack of preparation in the case.[176] Prosecutors have also been disciplined for making discretionary decisions

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[173] *See In re* Leonhardt, 930 P.2d 844 (Or. 1997) (imposing discipline on prosecutor for a number of ethics violations, including knowingly filing charges that were not supported by probable cause); *In re* Aubuchon, 309 P.3d 886 (Ariz. 2013); *In re* State Bar of Ariz. v. Thomas, PDJ-2011-9002 (Ariz. Apr. 10, 2012); *In re* Bunston, 155 P. 1109 (Mont. 1916). In several other cases, the disciplinary charges were not sustained. *See* Att'y Grievance Comm'n v. Gansler, 835 A.2d 548, 573–74 (Md. 2003); *In re* Burrows, 629 P.2d 820, 826 (Or. 1981); *In re* Lucareli, 611 N.W.2d 754 (Wis. 2000). Several other cases involved Iowa prosecutors who, with the knowledge and approval of the trial judge, allowed defendants charged with more serious crimes (as to which there was probable cause) to plead guilty to minor motor vehicle offenses that had no relationship to the defendants' alleged conduct. *See* Iowa Sup. Ct. Att'y Disciplinary Bd. v. Borth, 728 N.W.2d 205 (Iowa 2007); Iowa Sup. Ct. Att'y Disciplinary Bd. v. Zenor, 707 N.W.2d 176 (Iowa 2005); Iowa Sup. Ct. Att'y Disciplinary Bd. v. Howe, 706 N.W.2d 360 (Iowa 2005). Interestingly, the practice condemned by the Iowa Supreme Court in these decisions is openly undertaken in many other states. *See* Mari Byrne, Note, *Baseless Pleas: A Mockery of Justice*, 78 FORDHAM L. REV. 2961 (2010).

[174] These rules essentially codify the constitutional restriction on prosecuting a charge without probable cause. *See, e.g.*, Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978).

[175] *See, e.g.*, *In re* Wilson, 258 P.2d 433 (Ariz. 1953); People v. Anglim, 78 P. 687 (Colo. 1904); *In re* Norris, 57 P. 528 (Kan. 1899); *In re* Bell, 72 So. 3d 825 (La. 2011); *In re* Jackson, 27 So. 3d 273 (La. 2010); *In re* Burks, 964 So. 2d 298 (La. 2007); *In re* Serstock, 432 N.W.2d 179 (Minn. 1988); *In re* Biggers, 104 P. 1083 (Okla. 1909). *Cf.* Boyne v. Ryan, 34 P. 707, 708 (Cal. 1893) ("Of course, if in a clear case he should willfully, corruptly, or inexcusably refuse to perform his duty in the premises, he could be proceeded against for malfeasance or nonfeasance in office.").

[176] *See In re* Segal, 617 A.2d 238, 244 (N.J. 1992) (quoting RPC 1.1(a), RPC 1.3) (imposing discipline for prosecutor's failure to prepare adequately to prosecute a case, in violation of ethics rules providing in part that "[a] lawyer shall not: (a) Handle or neglect a matter entrusted to the lawyer in such manner that the lawyer's conduct constitutes gross negligence" and "[a] lawyer shall act with reasonable diligence and promptness in representing a client").

in instances where they had conflicts of interests, based on a professional, familial or business relationship with the putative defendant, or where their own financial interests were at stake.[177] Although the applicable disciplinary standard in these cases does not require a court to substitute its policy judgment for that of the prosecutor, it does require a greater intrusion into confidentiality and greater entanglement in the decision-making process than a mere review of the sufficiency of the evidence against the accused.

Whatever the theoretical justification, in practice, numerous state courts have exercised the authority to discipline prosecutors, expressing little doubt over their authority to do so. In late nineteenth century and early twentieth century disciplinary cases against prosecutors, state courts repeatedly emphasized judicial authority and responsibility to impose discipline as a response to prosecutorial misconduct, including in the context of charging decisions.[178] Contemporary state courts have continued to reject prosecutors' separation of powers arguments, implicitly or explicitly.[179]

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[177] *See, e.g.*, *In re* Bevins, 26 Haw. 570 (Haw. 1922); *In re Serstock*, 432 N.W.2d 179 (Minn. 1988). *See also* MacLean & Wilks, *supra* note 6 (citing cases); Zacharias, *supra* note 6, at 723–34 nn.6–7 (citing cases).

[178] *See, e.g.*, Att'y Gen. v. Pelletier, 134 N.E. 407 (Mass. 1922) (rejecting separation of powers argument in upholding judicial authority, pursuant to a statute, to remove a prosecutor from office for commission of a number of ethical violations, including failure to prosecute); *In re* Simpson, 83 N.W. 541, 553 (N.D. 1900) (imposing discipline for failure to prosecute, finding that "[t]he power to discipline attorneys, who are officers of the court, is an inherent and incidental power in courts of record, and one which is essential to an orderly discharge of judicial functions"); *In re* Burton, 246 P. 188 (Utah 1926) (citing both statutory authority and court's "inherent power . . . to cancel and revoke [prosecutor's] license and bar him from thereafter engaging in the practice of the law" for ethical violations including failure to prosecute, "though he, at the time, may hold a judicial or other official position"); *In re* Jones, 39 A. 1087, 1090–91 (Vt. 1898) (finding that prosecutor was "acting in his official capacity as an attorney of this court, and under the obligations assumed by him when he became such attorney" and that therefore "it is, beyond question, the right and duty of this court to deal with him as justice demands" and "[i]t may suspend or disbar him" for failure to prosecute); State v. Hays, 61 S.E. 355, 356 (W. Va. 1908) (finding that "[t]he mere fact that [the prosecutor] is liable to indictment for malfeasance in office, and to removal therefrom, does in no way affect the power and duty of the court to strike his name from the roll of attorneys for the same misconduct for which he could be also both indicted and removed").

[179] *See, e.g.*, Massameno v. Statewide Grievance Comm., 663 A.2d 317 (Conn. 1995) (holding, on the basis of both historical and normative principles, that separation of powers did not preclude judicial regulation and sanction of a prosecutor for misconduct committed in the course of the exercise of prosecutorial functions, including prosecuting a case without probable cause to believe defendant was guilty); *cf. In re* Appointment of Special State's Att'y, 713 N.E. 2d 168, 177 (Ill. App. Ct. 1999) (upholding judicial authority to terminate special State Attorney's appointment pursuant to statute, on the grounds that the attorney was "unable to attend" to duties, and holding that judge's order "was consistent with the judicial branch's role of supervising those attorneys who practice before it" and that "[t]he court's overall supervision of a specially appointed State's Attorney is not a judicial usurpation of executive discretion and does not constitute a violation of separation of powers"). *See generally* Melissa K. Atwood, Comment, *Who Has the Last Word?: An Examination*

The 1976 Oregon decision, *In re Rook*,[180] provides a particularly helpful illustration of a court's willingness to employ disciplinary authority to rein in abuses of prosecutorial discretion. After making a plea offer to one defendant, Rook refused to offer a similar deal to fifteen similarly situated defendants because they were represented by either of two attorneys whom Rook mistrusted. Significantly, plea bargain policies—particularly decisions to refuse to offer a plea bargain to a defendant—are often cited by courts as an area of prosecutorial discretion outside of the purview of adjudicatory review.[181] Here, however, the court disciplined the prosecutor for engaging in conduct "prejudicial to the administration of justice."[182] The court reasoned that the prosecutor violated a state statute requiring that "[s]imilarly situated defendants should be afforded equal plea agreement opportunities,"[183] and that the prosecutor's plea bargain policy was motivated by "overzealousness," "frustration," "animosity and a desire to punish."[184] The court observed that "to our knowledge, this is the first reported decision not only in Oregon, but in any other jurisdiction in the United States, involving a charge of misconduct against a prosecuting attorney in refusing to plea bargain with a criminal defendant."[185]

While it seems unlikely that federal courts would undertake such inquiry into a prosecutor's motivations, state courts have been less restrained, adopting a more liberal view of judicial power.[186] Moreover, regardless of any separation of power concerns, *Rook* demonstrates the authority and ability of a state court to inquire after-the-fact and sanction the prosecutor, if necessary, for an abuse of discretion, particularly for a violation of a statutory standard.

In sum, it is far from clear that federal separation of powers limitations on federal judges' oversight of prosecutors' discretion should be applicable to state court disciplinary regulation. State courts exercise the inherent authority to regulate the practice of law in their own jurisdiction, through which they enact and implement ethics rules that potentially subject lawyers to discipline. Notwithstanding concerns about separation of powers and the deference owed to prosecutorial discretionary decisions, state court opinions often demonstrate an

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of the Authority of State Bar Grievance Committees to Investigate and Discipline Prosecutors for Breaches of Ethics, 22 J. LEGAL PROF. 201 (1998).

[180] *In re* Rook, 556 P.2d 1351 (Or. 1976).

[181] *See generally* Brown, *supra* note 136.

[182] *In re Rook*, 556 P.2d at 1355 (citing DR 1-102(A)(5)).

[183] OR. REV. STAT. § 135.405(4).

[184] *In re Rook*, 556 P.2d at 1356 (internal quotation marks omitted).

[185] *Id.* at 1357.

[186] *See* Boulas v. Superior Court, 233 Cal. Rptr. 487 (Cal. Ct. App. 1986) (ordering dismissal of prosecution, based on prosecutorial misconduct in conditioning favorable plea on defendant's hiring a different lawyer); *cf.* Bourexis v. Carroll Cty. Narcotics Task Force, 625 A.2d 391 (Md. Ct. Spec. App. 1993) (agreeing that prosecutors cannot discriminate against the particular lawyer's clients, but concluding that lawyer lacks standing to complain).

overriding concern for judicial authority and responsibility to review and respond to prosecutorial misconduct. Contrary to the assumptions of several scholars, state courts have rejected separation of powers arguments in favor of judicial responsibility to ensure the fair administration of justice through the exercise of their authority to review charging decisions. Moreover, the relative infrequency of state court disciplinary review of prosecutors' charging and plea bargaining decisions may not reflect a view that the state constitution forbids courts from intruding into prosecutors' exercise of discretion. Alternatively, disciplinary authorities may have a general reluctance to proceed against prosecutors, in part because prosecutors' motivations and processes for making charging and plea bargaining decisions are rarely visible; indeed, in the case of declinations, even the fact that a decision was made may not always be visible outside the prosecutor's office.

B. *State Court Adoption or Interpretation of Disciplinary Rules to Regulate Prosecutors' Charging Decisions*

In Section A, we showed that state courts' disciplinary authority allows a measure of inquiry into prosecutors' charging and plea bargaining practices. Among other points, we noted, it would be reasonable for state courts to discipline prosecutors who abuse their discretion in violation of constitutional or statutory standards. The more difficult question, however, is the extent of state courts' rulemaking authority to establish independent disciplinary standards that govern prosecutors' exercise of charging and plea bargaining discretion, and the degree to which that power is limited by state constitutional separation of powers principles.[187]

In *Rook*, for example, the court relied on the prosecutor's violation of a statutory standard as the ground for imposing discipline for the prosecutor's abuse of charging discretion. Absent the statutory violation, might the court have punished the prosecutor for conduct prejudicial to the administration of justice? Doing so would imply independent judicial authority to adopt an ethics rule that has the effect of forbidding a prosecutor from making arbitrary or improperly motivated charging or plea bargaining decisions. Such lawmaking authority might derive from courts' inherent or supervisory power to regulate lawyers,[188] or from the power that some state courts have exercised to remove prosecutors who are not faithfully carrying out the duties of the office.[189]

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[187] Additional questions, which we do not explore here, might be raised insofar as state or federal courts sought to apply independent disciplinary standards to federal prosecutors. *See generally* Bruce A. Green & Fred C. Zacharias, *Regulating Federal Prosecutors' Ethics*, 55 VAND. L. REV. 381 (2002); Fred C. Zacharias & Bruce A. Green, *Federal Court Authority to Regulate Lawyers: A Practice in Search of A Theory*, 56 VAND. L. REV. 1303 (2003).

[188] *See, e.g.*, Zacharias & Green, *supra* note 187, at 1308 n.12.

[189] *See supra* note 174.

Early disciplinary decisions sanctioning prosecutors for failure to prosecute do not resolve this question,[190] because they were premised on the prosecutor's statutory obligation to bring all cases supported by sufficient evidence.[191] Today, in contrast, prosecutors are generally expected to balance a variety of legitimate considerations in deciding whether to prosecute in individual cases or classes of cases in which there is sufficient evidence of guilt to go forward.[192] Thus, like *Rook*, the early cases support the authority of state courts to sanction prosecutors for charging decisions that violate statutory law, but they leave open the question of state courts' authority to establish their own disciplinary standards governing prosecutors' charging discretion.[193]

Nor is this question resolved by cases in which courts have disciplined prosecutors for making discretionary decisions in instances where they had conflicts of interests.[194] In these cases, rather than reviewing the substance of the prosecutors' exercise of discretion, the courts imposed discipline on the grounds that prosecutors with conflicts of interests should not participate in the matter at all. Therefore, the conflict cases do not resolve whether courts have the authority, absent a settled legal standard, to sanction prosecutors for abusing their discretion.

However, a handful of other contemporary decisions suggest some willingness among state courts to look beyond established law and to invoke their own disciplinary standards to regulate prosecutors' discretionary charging and plea bargaining decisions. For example, a New Jersey prosecutor was sanctioned for fixing traffic tickets as a favor for someone with connections to the police and political figures.[195] Notably, unlike other cases where prosecutors were punished for fixing tickets,[196] the prosecutor did not act criminally or to serve his own

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[190] *See supra* notes 170–72 and accompanying text.

[191] *See, e.g.*, Commonwealth *ex rel.* Att'y Gen. v. Hipple, 69 Pa. 9, 1870 WL 8849 (Pa. 1870), at *6; *see also Ex parte* Hayter, 116 P. 370, 374–75 (Cal. Dist. Ct. App. 1911); State on Info. of McKittrick v. Graves, 144 S.W.2d 91 (Mo. 1940); State on Info. of McKittrick v. Wymore, 132 S.W.2d 979 (Mo. 1939); State v. Winne, 96 A.2d 63 (N.J. 1953).

[192] *See, e.g.*, ABA CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION § 3-4.4 (4th ed. 2015) (stating that "[i]n order to fully implement the prosecutor's functions and duties, including the obligation to enforce the law while exercising sound discretion, the prosecutor is not obliged to file or maintain all criminal charges which the evidence might support" and listing "factors which the prosecutor may properly consider in exercising discretion to initiate, decline, or dismiss a criminal charge, even though it meets the requirements" for prosecution under Standard 3-4.3).

[193] *Cf.* Armstrong [Armstead] v. Harkness, No. 02-C-687-C, 2002 WL 32344429 (W.D. Wis. Dec. 30, 2002) (citation omitted) ("The decision to initiate a criminal prosecution is within the exclusive province of the prosecutor. If a prosecutor cannot be held liable for deciding not to prosecute, [the Florida Bar] cannot be held liable for declining to discipline a prosecutor for exercising his or her discretion.").

[194] *See supra* notes 73 & 177.

[195] *In re* Weishoff, 382 A.2d 632 (N.J. 1978).

[196] For other cases in which prosecutors have been disciplined for improperly dismissing criminal cases and traffic tickets, see, for example, *In re* Bell, 72 So. 3d 825 (La. 2011); *In re*

financial self-interest, nor did the prosecutor have a personal connection to the defendant such that participating in the matter involved a conflict of interest.[197] Nevertheless, it was plain to the court that the prosecutor's exercise of discretion was punishable in that it was based on an impermissible consideration: The prosecutor favored individuals in the criminal process because of their connections. Likewise, as the more recent disciplinary case against Andrew Thomas illustrates,[198] courts may consider themselves authorized to discipline prosecutors for factoring impermissible considerations—such as political animosity—into their charging decisions.

The most far-reaching and illuminating decision on courts' disciplinary authority to set independent standards regulating prosecutorial discretion may be a 2012 case, *In re Flatt-Moore*,[199] in which an Indiana prosecutor was reprimanded for conditioning a favorable plea bargain on the defendant's willingness to meet the victim's demand for restitution in an amount exceeding the victim's actual loss. The court stated that although prosecutors have discretion to consider the victim's input, they may not put the terms of plea bargains "entirely in the hands of the victims," because then "defendants whose victims are unreasonable or vindictive cannot receive the same consideration as defendants whose victims are reasonable in their demands. . . . [R]esolution of criminal charges could [appear to] turn on the whims of victims rather than the equities of each case."[200] While in *Thomas*, abuses of prosecutorial discretion were overshadowed by other forms of prosecutorial misconduct,[201] in *Flatt-Moore*, the improper use of the charging power was the sole ground for discipline.

The *Flatt-Moore* decision is thus a potentially strong, albeit implicit, vindication of judicial power to set disciplinary standards for prosecutorial abuse of charging discretion. Significantly, unlike disciplinary cases involving bribery or prosecutorial violations of constitutional or legislative standards, the restriction the *Flatt-Moore* court imposed on the exercise of prosecutorial discretion was both judicially constructed and, even if justified, far from obvious and at least subject to debate. After all, the court's conclusion that similar cases should not be treated differently based on the different preferences of victims is not self-evident. Indeed, prosecutors are ordinarily permitted or expected to take account of victims'

Jackson, 27 So. 3d 273 (La. 2010); *In re* Burks, 964 So. 2d 298 (La. 2007); *In re* Serstock, 432 N.W.2d 179 (Minn. 1988); *In re* Rosen, 452 N.Y.S.2d 435 (N.Y. App. Div. 1982).

[197] *In re Weishoff*, 382 A.2d 632 at 635 (finding that "respondent, in acting as he did, sought no personal profit for himself and merely thought he was doing a 'favor'").

[198] *In re* State Bar of Ariz. v. Thomas, PDJ-2011-9002 (Ariz. Apr. 10, 2012). *See supra* notes 101–06 and accompanying text.

[199] *In re* Flatt-Moore, 959 N.E.2d 241 (Ind. 2012).

[200] *Id.* at 245. *See also In re* Bonet, 29 P.3d 1242 (Wash. 2001) (imposing discipline for prosecutor's offer to dismiss charges against defendant in exchange for defendant's agreement not to testify on behalf of co-defendant).

[201] *See supra* notes 101–06 and accompanying text.

interests, and in some jurisdictions they are required by law to do so.[202] For example, it is at least plausible that in deciding whether to seek the death penalty in a capital case, a prosecutor may defer to the preferences of a victim's family,[203] or that in deciding whether to offer a favorable plea in a domestic violence case, a prosecutor may defer to the victim's preference whether or not to testify at trial. Although the court in *Flatt-Moore* found that the prosecutor overvalued the victim's interests, the prosecutor's decision making was apparently based on a broad evaluation of legitimate considerations, not on an impermissible or irrelevant relationship with the victim.

Nevertheless, the court criticized the prosecutor's exercise of discretion on the ground that the victim's desire for greater compensation seemed "unreasonable" or "vindictive."[204] Apparently, from the court's perspective, the prosecutor essentially enabled a private party to take the prosecutorial reins for the purposes of extorting excessive civil restitution. Arguably, however, from the prosecutor's perspective, it may have seemed appropriate for victims of financial crimes to be compensated in a greater amount than their actual loss, taking into account the costs, including money, time, and anxiety, attributable to pursuing restitution. In rejecting this approach, the court appears to have exercised the authority to substitute its judgment about prosecutorial priorities for those of the prosecutor, thus reaching a decision that may have broad implications for questions regarding the extent and limits of judicial authority to establish and enforce disciplinary standards for prosecutor's charging decisions.

Finally, it should be noted that expanded judicial exercise of disciplinary authority to regulate prosecutors' charging and plea bargaining decisions would not be limited to reviewing and potentially meting out punishment in response to accusations of prosecutorial misconduct. State courts could also set standards regulating prosecutorial discretion, either by adopting additional rules of

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[202] *See* People v. Mack, 473 N.E.2d 880, 886 (Ill. 1984) ("This court's attention has not been directed to any decisions holding that it is unconstitutional for a prosecutor to consider the wishes of the victim's family in deciding whether to plea bargain. Our own research has not disclosed any such cases. In some States there are statutes which specifically allow or require a prosecutor to consider the wishes of the victim's family in conducting plea-bargaining discussions."), *cert. granted, judgment vacated sub nom.* Mack v. Illinois, 479 U.S. 1074 (1987); Commonwealth v. Latimore, 667 N.E.2d 818, 824 (Mass. 1996) (holding that prosecutor "may consider the harm or impact to the victim and the victim's family, and may give deference to the views of the victim and the victim's family, when deciding whether to agree with the defendant and ask that the judge accept a plea to a lesser charge or to oppose the judge's acceptance of a defendant's plea to a lesser charge"); 5 WAYNE R. LAFAVE, JEROLD H. ISRAEL, NANCY J. KING & ORIN S. KERR, CRIMINAL PROCEDURE § 21.3(f) (4th ed. 2009) ("Provisions on prosecutor/victim consultation are quite common; they exist in about two-thirds of the states as well as on the federal level."); *id.* at nn.379–90 (citing statutes).

[203] *See, e.g.*, *Mack*, 473 N.E.2d at 887 (holding that "a prosecutor is not barred from considering the wishes of the victim's family in determining whether to accept an offered plea bargain in a case where capital punishment is a possibility").

[204] *Flatt-Moore*, 959 N.E.2d at 245 (Ind. 2012).

professional conduct explicitly addressing prosecutors' discretionary decision making,[205] or by issuing interpretive opinions applying existing ethics rules in the context of charging and plea bargaining.[206] For example, courts might forbid practices that, though lawful, seem ethically problematic, such as pursuing criminal charges unless an arrestee waives colorable civil rights claims,[207] or making "exploding" plea offers that are withdrawn before defense counsel can adequately investigate the case and competently advise the defendant.[208] However, whether and how courts should exercise robust disciplinary authority are questions that will remain for another day.[209]

V. CONCLUSION

Our examination of state court review of prosecutors' discretionary decisions, in the context of both adjudication and discipline, does not justify, with any degree of confidence, predictions about the future expansion of disciplinary authority over prosecutors' charging decisions. Recent cases, such as *Thomas* and *Flatt-Moore*, in which courts disciplined prosecutors for abusing their discretion, might be viewed as aberrations or, alternatively, as modest and tentative steps with important potential implications for a more expansive exercise of courts' regulatory authority.

Nevertheless, the extensive historical and contemporary record of judicial review of prosecutors' charging decisions may indeed suggest a justification for state courts, if they so choose, to regulate prosecutorial discretion more

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[205] *See supra* notes 59–61 and accompanying text.

[206] *See* United States v. Ky. Bar Ass'n, 439 S.W.3d 136, 156–57 (Ky. 2014) (affirming bar association ethics opinion finding that it is unethical for a prosecutor to include an ineffective-assistance-of-counsel waiver in a plea agreement because doing so induces defense counsel to violate the conflict-of-interest rule and, additionally, is contrary to prosecutor's role as "minister of justice").

[207] *See* Erin P. Bartholomy, *An Ethical Analysis of the Release-Dismissal Agreement*, 7 NOTRE DAME J.L. ETHICS & PUB. POL'Y 331 (1993); Andrew B. Coan, *The Legal Ethics of Release-Dismissal Agreements: Theory and Practice*, 1 STAN. J. C.R. & C.L. 371 (2005); Andrea Hyatt, *Release-Dismissal Agreement Validity—From* Per Se *Invalidity to Conditional Validity, and Now Turning Back to* Per Se *Invalidity*, 39 VILL. L. REV. 1135 (1994); Ken Takahashi, *The Release-Dismissal Agreement: An Imperfect Instrument of Dispute Resolution*, 72 WASH. U. L.Q. 1769 (1994); James A. Trowbridge, *Restraining the Prosecutor: Restrictions on Threatening Prosecution for Civil Ends*, 37 ME. L. REV. 41, 49–53 (1985).

[208] *See* Vida B. Johnson, *A Plea for Funds: Using* Padilla, Lafler *and* Frye *to Increase Public Defender Resources*, 51 AM. CRIM. L. REV. 403, 419–20 (2014); Jonathan A. Rapping, *Who's Guarding the Henhouse? How the American Prosecutor Came to Devour Those He is Sworn to Protect*, 51 Washburn L.J. 513, 550 (2012).

[209] Likewise, this Article leaves open the question of whether, in comparison with other approaches, enhanced judicial exercise of disciplinary authority might provide a more appropriate and effective mechanism for responding to the problem of abuse of prosecutorial power. *See, e.g.*, Samuel J. Levine, *The Potential Utility of Disciplinary Regulation as a Remedy for Abuses of Prosecutorial Discretion*, 12 DUKE J. CONST. L. & PUB. POL'Y (forthcoming 2016).

meaningfully. Likewise, law reform advocates seeking avenues to respond to documented and perceived incidents of prosecutorial abuse of discretion may be encouraged to give a fresh look to the possible role of state court disciplinary regulation. Ultimately, it would appear that the extent to which state courts might be expected to exercise a more robust form of disciplinary authority over prosecutorial charging decisions will turn on courts' broader understanding of judicial responsibility to ensure the fair administration of justice within the confines of their interpretation of the limitations that state constitutions impose on judicial power.